Supreme Court, U.S.
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No. 94-6187

In The

# Supreme Court of the United States

October Term, 1994

STEVEN KURT WITTE,

*Petitioner,*

vs.

UNITED STATES

On Writ Of Certiorari To The
United States Court of Appeals
For The Fifth Circuit

## JOINT APPENDIX

ROLAND E. DAHLIN II
Federal Public Defender
Southern District of Texas
440 Louisiana, Suite 310
P.O. Box 61508
Houston, TX 77208-1508
Telephone: (713) 238-9600

*Counsel for Petitioner*

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, DC 20530
Telephone: (202) 514-2217

*Counsel for Respondent*

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**NO. 94-6187**
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Cr. No. H-92-207 (S.D. Tex.)

| Date | Proceedings |
|---|---|
| 09/02/92 | Indictment filed |
| 12/23/92 | Defendant's motion to dismiss because of double jeopardy and breach of the plea agreement filed |
| 02/12/93 | Government's response to Defendant's motion to dismiss because of double jeopardy and breach of the plea agreement filed |
| 02/22/93 | Defendant's reply to Government's response to Defendant's motion to dismiss because of double jeopardy and breach of the plea agreement filed |
| 02/22/93 | Order following pretrial conference granting motion to dismiss because of double jeopardy and breach of the plea agreement entered |
| 02/24/93 | Order granting motion dismissing indictment entered |
| 03/22/93 | Government's notice of appeal filed |
| | C.A. No. 93-2245 (5th Cir.) |
| 04/13/93 | Order of the Court of Appeals for the Fifth Circuit granting Government's motion to supplement the record with the record in Cr. No. H-91-033 filed |
| 06/23/94 | Opinion of the Court of Appeals for the Fifth Circuit reversing the judgment of the District Court issued |

* Text of entries edited for clarity.

**STEVEN KURT WITTE V. UNITED STATES**
**NO. 94-6187**
Relevant Docket Entries*
Cr. No. H-91-033 (S.D. Tex.)

| Date | Proceedings |
|---|---|
| 02/11/91 | Criminal complaint filed |
| 03/04/91 | Indictment filed |
| 02/21/92 | Rearraignment held and guilty plea on Count Two entered |
| 06/18/92 | Final presentence investigation report filed |
| 06/22/92 | Defendant's objections to the presentence report filed |
| 07/10/92 | Defendant sentenced (Count 2) 144 mos. to serve plus 5 yrs. supervised release term and $50 special assessment imposed – Government's motion to depart granted, and Defendant's motion to withdraw plea denied |
| 07/10/92 | Motion by Government for downward departure for substantial assistance filed |
| 07/10/92 | Order dismissing Count One entered |
| 07/10/92 | Order granting motion for downward departure entered |
| 07/10/92 | Defendant's notice of appeal filed |
| 07/14/92 | Judgment entered |
| | C.A. No. 92-2567 (5th Cir.) |
| 12/16/92 | Order of the Court of Appeals for the Fifth Circuit, dismissing appeal for failure to file brief, entered |

* Text of entries edited for clarity.

United States District Court
DISTRICT OF

UNITED STATES OF AMERICA
V.

CRIMINAL COMPLAINT

Kurt Steven WITTIE
Sam Richard KELLY

CASE NUMBER: H-91-121M

**(Name and Address of Defendant)**

I, the undersigned complainant being duly sworn state the following is true and correct to the best of my knowledge and belief. On or about February 8, 1991 in Harris county, in the Southern District of Texas defendant(s) did, (Track Statutory Language of Offense)

knowingly, willfully, unlawful and intentionally conspire to possess with intent to distribute more than 100 kilograms of marijuana.

in violation of Title 21 United States Code, Section(s) 846 and 841(a)(1) I further state that I am a(n) DEA Special Agent and that this complaint is based on
Official Title
the following facts:

See Attached Affidavit

Continued on the attached sheet and made a part hereof:
[X] Yes [ ] No

/s/ Illegible
Signature of Complainant

Sworn to before me and subscribed in my presence,

2/11/91
Date

at Houston, Texas
City and State

| | |
|---|---|
| _____ | /s/ George A. Kelt Jr. |
| Name & Title of Judicial Officer | Signature of Judicial Officer |

AFFIDAVIT

June 9, 1990 – The CI and S/A Norman observed by S/A Brother and U.S.C. S/A Tom Austin met Kurt WITTIE and Dennis MASON by the pool of the Holiday Inn, 10510 I-45 North, Houston, Texas. In undercover negotiations, MASON had fifteen (15) tons of marijuana to get out of Mexico. MASON would pay $165.00 per pound to fly it out. First, the load would be 6,000 pounds and then a second load in 4-5 days. MASON and WITTE agreed to furnish $30,000.00 expense money. WITTIE said that he had a stash ranch in Montgomery County and would buy a horse trailer that could hold 2,000 pounds easy.

June 14, 1990 – S/A Roger Norman and the CI met MASON and WITTIE at the Holiday Inn, I-45 North, Houston, Texas. The undercover negotiations resulted in that MASON and WITTIE would go get $30,000.00 at the ranch. At 6:30 P.M., the CI and S/A Norman met MASON at Houston International Airport. MASON gave S/A Norman $30,000.00 in the restroom at Intercontinental Airport. The CI and MASON then departed Intercontinental Airport enroute to Mexico via Tucson, Arizona.

June 20, 1990 – The CI and MASON met Tom PARKORNY in Tucson, Arizona. All departed to Mexico.

June 27, 1990 – S/A Norman and the CI met Tom PARKORNY at the Holiday Inn, I-45 North, Houston, Texas. Tom PARKORNY wanted S/A Norman to fly to Guatemala to see airstrip and fly cocaine into United States.

WITTIE currently in Denver, Colorado and MASON was still in Mexico.

July 15, 1990 – S/A Norman U.S.C.S. S/A Tom Austin, and the CI met with Tom PARKORNY, MASON and WITTIE at the Holiday Inn, J.F.K. Blvd and Beltway 8, Houston, Texas. Undercover negotiations, S/A Norman would do the Mexico deal or the Guatemala deal whichever came first.

July 23, 1990 – S/A Norman and the CI met Tom PARKORNY at the Sheraton Inn, J.F.K. Blvd and Beltway 8, Room 326. Tom PARKORNY provided $100,000.00 expense money to S/A Norman to fly 4,400 pounds of marijuana out of Oxaca, Mexico.

July 27, 1990 – S/A Norman debriefed the CI upon the return from Oxaca, Mexico. The airstrip was fine and the CI gave coordinates to S/A Norman as they were given to him by MASON.

August 12, 1990 – A seizure of 590 kilograms of cocaine and five (5) arrests including MASON and DEA Fugitive, Victor AYON-Hernandez in Oxaca, Mexico.

August 13, 1990 – U.S.C.S. S/A Tom Austin, S/A Norman and two (2) CIs met WITTIE at the Kettle Restaurant, J.F.K. and Beltway 8, Re: Oxaca, Mexico. S/A Norman advised WITTIE that the pilots were unable to land because the police had shown up at the strip with helicopters.

January 25, 1991 – S/A Norman"s called Kurt WITTIE, pager number 1-800-759-7234, pin number 24323.

January 25, 1991 – Kurt WITTIE called S/A Norman from Tucson, Arizona at (602)881-9504. WITTIE wanted 1,000

lbs. of marijuana and would call back Monday if he could raise the $50,000 for the down payment.

January 28, 1991 – WITTIE called S/A Norman from Denver, Colorado at (303)772-9838. WITTIE stated that he had the $50,000.00 for the down payment and wanted S/A Norman to give WITTE his horse trailer back so WITTIE could use it as one of his load vehicles. WITTIE would bring a motorhome from Denver, Colorado for the second load vehicle. In the undercover negotiations S/A Norman stated that he would call WITTIE late Sunday Night or early Monday Morning (February 4, 1991) and tell him when to be in Houston.

February 3, 1991 - S/A Norman paged WITTIE. When WITTIE telephonically contacted S/A Norman, WITTIE was advised by S/A Norman to be in Houston, Texas on Wednesday Morning, February 6, 1991.

February 5, 1991 – S/A Norman was paged by WITTIE and they spoke via the telephone. WITTIE advised that he was in Amarillo, Texas and had the motorhome and would be in Houston, Texas on Wednesday Morning, February 6, 1991 with the $50,000.00.

On February 7, 1991 at approximately 5:20PM, S/A Norman was paged by WITTIE. S/A Norman called WITTIE who advised he was in Dallas, Texas. It was agreed between WITTIE and S/A Norman that WITTIE would come to Houston, Texas and upon arrival, page S/A Norman.

At approximately 10:30PM on February 7, 1991, S/A Norman received a page from WITTIE. S/A Norman met with WITTIE at the Bennigan's Restaurant in the vicinity

of Interstate 45 and FM 1960 West, Houston, Texas. At approximately 12:15PM, S/A Norman called S/A Brothers and U.S. Customs Agent Tom Austin to come pick up WITTIE's motorhome which was to be used as a transport vehicle for the marijuana. Upon arrival at the Bennigan's parking lot, S/A Norman and WITTIE met with S/A Brothers and Austin in the motorhome. WITTIE pointed out all the hidden compartments in the motorhome and discussed how to hook up the horse trailer which WITTIE had previously delivered to S/A Norman, also to be used as a load container for marijuana. WITTIE gave the motorhome to S/A Norman and S/A Brothers drove the motorhome away, followed by S/A Austin. S/A Norman went with WITTIE to the room 219 at the LaQuinta Inn, 11711 North Freeway, Houston, Texas to look at the money.

Surveillance was conducted on WITTIE and KELLY all night and continued on February 8, 1991 at the LaQuinta Inn.

At approximately 10:40AM on February 8, 1991, S/A's Norman and Brothers met with WITTIE and KELLY in room 219 at the LaQuinta Inn. WITTIE introduced Sam KELLY as the driver of the motorhome. S/A Brothers and KELLY left and proceeded to the Northwest Mall, Loop 610 and 18th Street, Houston, Texas, where the motorhome and horse trailer were parked.

Upon arrival, KELLY took possession of the motorhome and horse trailer which were being utilized as load vehicles containing 1000 pounds of marijuana. The aggregate amount of marijuana placed in the motorhome and horse

trailer by undercover agents was 360 pounds. After taking possession of the motorhome and horse trailer, KELLY was arrested.

WITTIE was arrested in the parking lot of the LaQuinta Inn.

/s/ C. Brothers
Cliff Brothers, Special Agent
Drug Enforcement Administration

Sworn and subscribed to before me this 11th day of February, 1991.

/s/ George A. Kelt, Jr.
U.S. Magistrate Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | § | |
| | § | CRIMINAL NO: |
| | § | H 91 33 |
| v. | § | CRIMINAL |
| KURT STEVEN WITTIE | § | COMPLAINT |
| SAM RICHARD KELLY | § | NO. H-91-121M |

## INDICTMENT

THE GRAND JURY CHARGES THAT:

## COUNT ONE

On or about January 25, 1991 through February 8, 1991, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, KURT STEVEN WITTIE and SAM RICHARD KELLY, defendants herein, along with others known and unknown to the Grand Jury, did knowingly and intentionally conspire, confederate, and agree with each other to commit an offense defined in Title 21, United States Code, Section 841(a)(1), namely, to possess with intent to distribute in excess of one hundred (100) kilograms of marijuana, a Schedule I Controlled Substance. (Violation: Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(B) and 846).

## COUNT TWO

On or about February 8, 1991, in the Houston Division of the Southern District of Texas, and within the

jurisdiction of this Court, KURT STEVEN WITTIE and SAM RICHARD KELLY, defendants herein, each aiding and abetting the other, along with others known and unknown to the Grand Jury, did knowingly and intentionally attempt to possess with intent to distribute in excess of one hundred (100) kilograms of marijuana, a Schedule I Controlled Substance. (Violation: Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(B); 846 and Title 18, United States Code, Section 2).

A TRUE BILL:

/s/ Gloria J Hashr
FOREPERSON OF THE GRAND JURY

RONALD G. WOODS
United States Attorney

By: /s/ Bertram A. Isaacs
BERTRAM A. ISAACS
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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(Caption Omitted In Printing)

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**PLEA OF GUILTY**

I, Kurt Steven Wittie, Defendant in this Cause, desire to enter a plea of guilty to Count One of the Indictment returned against me. To induce the Court to accept the plea, I state to the Court, under oath, as follows:

1. I have had the benefit of counsel and have consulted fully with my counsel prior to entering this plea.

2. I understand that, regardless of my guilt or innocence, I am entitled to enter a plea of not guilty and stand trial.

3. I understand I have a right to a jury trial, the right to have an attorney assist me in trial, the right to subpoena witnesses and evidence, the right to present evidence, to confront and cross-examine witnesses, the right not to testify and the right to be convicted only by a unanimous verdict, if I should have a jury trial. Knowing these rights, I still wish to plead guilty.

4. I understand the elements of the offense, and I am entering this plea freely and voluntarily, in the exercise of my own good judgment, because I am guilty.

5. I have received no promises of leniency, or of any other nature, other than those made a part of this pleading, from my own attorney, the attorneys for the United

States or from any other person, to induce me to plead guilty.

6. I have received no threat of a more severe sentence, of harsh treatment or of any other nature to induce me to plead guilty.

7. I understand that any statement by my attorney, by the attorney for the United States, or by any other person concerning what sentence I might receive is not binding on the Court. This plea is made pursuant to Rule 11(e)(1)(B).

8. I am not under the influence of alcohol, drugs or narcotics; I have no reason to believe that I am now, or ever have been, insane or of unsound mind. I assert that I am fully competent and in full possession of my faculties.

9. I am fully satisfied with the services of my attorney and believe he has represented me ably and conscientiously in this matter.

10. I understand that no one who has been convicted of a felony offense may possess a firearm. It has been explained to me that I cannot receive a firearm now and will not be able to possess a firearm after I am sentenced.

11. I understand the penalty for Count Two [WTH KW BI] is five (5) to forty (40) in prison; a $2,000,000 fine and four (4) years supervised release after such term of imprisonment. I also understand that the Court may assess any lawful sentence, including the maximum for this offense.

12. I understand that a special assessment of $50.00 as to Count Two [WTH KW BI] of the Indictment will

be imposed on me by the Court pursuant to Title 18. United States Code, Section 3013 and is to be paid at the time of sentencing by check payable to United States Attorney's Office, 515 Rusk Avenue, Houston, Texas 77002.

13. My attorney has explained to me that after I have been released from prison, I must serve a term of supervised release.

I understand that the Judge will order, as some of the Conditions of Supervised Release that I not commit another Federal, State or Local Crime during the term of supervision and that I cannot possess illegal controlled substances. In addition the Judge will order other specific conditions that I must follow and obey while on supervised release.

I further understand that while on supervised release, the Judge may extend the term of supervised release, and may modify, reduce or enlarge the conditions. I also understand that if the Judge finds that I violated any condition of my supervised release, that the Judge will revoke such supervised release and that I will be required to serve in prison all or part of the term of supervised release without credit for time previously served on post release supervision.

14. After consulting with my attorney, I have entered into the following agreement, in the nature of a "Plea Agreement", with the United States Attorney, to this effect and no further:

I will enter a guilty plea to Count Two [WTH KW BI] of the Indictment and persist with that plea through sentencing. In exchange, the Government agrees to dismiss Count One at [WTH KW BI] at that time.

Further, I agree to cooperate in good faith with the Government by providing truthful and complete information concerning this and all other offenses about which I might be questioned by agents of law enforcement.

I understand that if I am called to testify before a Grand Jury or a trial jury concerning this information that I must not only tell the complete truth concerning any question I am asked, but I must not withhold any evidence that may relate to the guilt or innocence of any other person. I know that my response to all questions whether they be by the Assistant United States Attorney, the Defense attorney or the U.S. District Judge must be the truth. The Government agrees to file a 5K1.1 Motion for Departure at time of sentencing if my cooperation results in substantial assistance. Whether substantial compliance has been met will be determined by the Government. This includes departure below any statutory mandatory minimum sentence.

I understand that if I fail to honor my agreement with the Government to cooperate, as detailed in this agreement, the Government will be under no obligation to Dismiss Count One [WTH KW BI] and may proceed with prosecution of those charges.

/s/ Kurt Steven Witte
KURT STEVEN WITTIE

SUBSCRIBED AND SWORN TO BEFORE ME THIS 21st DAY OF February, 1992.

JESSE E. CLARK, Clerk

By: /s/ J Richards
Deputy Clerk

APPROVED:

/s/ Bertram A. Isaacs
BERTRAM A.
ISAACS
Assistant United
States Attorney

/s/ Wm T illegible
Wm T illegible
Attorney for
Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION
(Caption Omitted In Printing)
REARRAIGNMENT HEARING
BEFORE THE HONORABLE NORMAN BLACK, UNITED STATES DISTRICT JUDGE,

* * *

[1] **THE COURT:** We're going to move expeditiously in 91-33, because I have promised my friend, Judge Hearne, that Mr. Ervin will be back there very quickly. Tell me what you've got to say today.

**MR. ISAACS:** Yes, sir. Judge, it's just a matter of explaining the plea agreement –

**THE CLERK:** I can't hear you.

**MR. ISAACS:** – I'm sorry, to the Court; and I don't know whether it was a matter that needed to be recorded or not; it's up to the Court.

**THE COURT:** All right.

**MR. FLOOD:** Your Honor –

**THE COURT:** I thought you were out?

**MR. FLOOD:** Well, I – I am, Your Honor, except that I – I want to argue that pretrial disclosure – no. I am out, Your Honor. But I was the one who was really a party to all the plea agreements. I want to ensure Mr. Habern understood it and the Court understood it. And Mr. Isaacs and I have really been the one that have discussed the plea agreement. Also, I kept getting a call

from your Courtroom Deputy, Your Honor, to be here and then I didn't want to be in violation of your Order.

**THE COURT:** Well, you're not going to be any problem, as long as you're satisfied Mr. Habern is certainly well qualified to handle this matter.

**MR. HABERN:** Thank you, Your Honor.

[2] **MR. FLOOD:** Absolutely, Your Honor. Absolutely. Well, if I may just be here for the plea –

**THE COURT:** Oh sure. sure.

**MR. FLOOD:** – for the discussions about the plea. Let me – let me tell you, since we're speaking about that issue. On the plea of guilty, it had to be amended – if you notice where the defendant, Mr. Witte, and I assume Mr. Kelly will be pleading to Count II rather than Count I and related to that is the following agreement, Your Honor. Even though it is not reflected in the plea of guilty. That is that they would plead to Count II of the indictment, that is, the possession in excess of 100 kilograms. That the amount possessed would be the actual amount possessed, which I believe was in the neighborhood of 370 pounds, is that correct, Mr. Isaacs?

**MR. ISAACS:** Well, Your Honor, if you want me to continue, that's only what's actually there, Your Honor. But I want to make it clear that the government stipulated how much was in that vehicle with respect to – this is like anything else in a plea agreement, when the PSI comes out there may be some relevant conduct issues which the court may want to take into consideration or

disregard. But we are stating on the record that the factual basis is that what was contained in that vehicle was approximately 375 pounds of marijuana –

**MR. FLOOD:** Right.

**MR. ISAACS:** – which they actually took possession of.

[3] **MR. FLOOD:** And we – Mr. Isaac's and I have discussed the sentencing guideline range for that and everything. What I'm concerned about, is this relevant conduct issue. Because apparently, there is discussion about 1000 pounds and also as the Court's aware there was a previous case that the government has contended all along had nothing to do with this. And that's – I assume still maintains had nothing to do with this. But I don't want the presentence report coming back with the previous case as relevant conduct, and the discussions surrounding the conspiracy is relevant conduct. So I wanted there to be an agreement now, so that we don't run into some problems with the probation department, that the amount possessed is 300 and something pounds, that's the guideline calculation range, that the so-called kilos of cocaine that are down in Oaxaca, Mexico that a guy by the name of Dennis Mason was arrested on, are not calculated into Mr. Witte's guidelines, and that – that's my concern?

**THE COURT:** Well, as you know, neither you, nor I, nor the probation officer is bound by what the probation officer finds out.

**MR. FLOOD:** Unfortunately, I understand that.

**THE COURT:** The government of course could agree that they would be willing to allow a downward departure to the amount actually possessed.

**MR. ISAACS:** Your Honor, with respect to first – [4] respect to stipulating to an amount for the purposes of relevant conduct, I don't think I can in good faith talk about that. On the other hand, I might also state to the Court, that Mr. Witte has been living up to his agreement to provide information to the government. If he continues with that through sentencing, I anticipate that he – that the government will be filing a motion for purposes of the downward departure.

**THE COURT:** I understand that.

**MR. ISAACS:** Again, and I say this respectfully, the decision is going to be let up to the Court as to what the sentence is going to be on Mr. Witte. The government can only state the facts as they come out. But I do not intend by any statement here to try to usurp the – what the gov – the Court and the probation department will be doing.

**THE COURT:** Well, remember of course, that if the probation officer says that the guidelines require a calculation on the basis of a 1000 pounds because they discussed it and I decide to sentence on the basis of 350 pounds, it's up to the government whether they want to appeal.

**MR. FLOOD:** Right. Right.

**THE COURT:** You're hearing an agreement that they're not going to in affect?

**MR. FLOOD:** That's correct.

**THE COURT:** Isn't that right, Mr. Isaacs?

**MR. ISAACS:** Yes, Your Honor. Basically whatever the [5] Court decides we will not probably appeal on that issue.

**MR. FLOOD:** Okay. U.S. Attorney has received some serious problems in the Valley especially trying to stipulate to lower amounts and the Attorney General has gotten upset about it. I intend to follow the law. But I pretty strongly understand that there's a lot of conversation that goes on in these cases, that's really just conversation.

**MR. FLOOD:** I just wanted to cle – it's not reflecting the plea of guilty, Your Honor.

**THE COURT:** I think I understand you completely, Chris, I don't see any problem with that.

**MR. FLOOD:** Also, and then I'm going to leave you alone, Mr. Witte has, I understand met with the agents once. That Mr. Habern was present during that and it's my understanding that the agent is requesting further assistance from Mr. Witte, and in order to provide that assistance it is imperative that he be out pending sentencing, so that he can have potential conflict with – not conflict, potential contact with an individual that they're allegedly talking about.

**THE COURT:** I understand.

**MR. FLOOD:** And I know that, only because I have discussed that with the agents. And I just want to tell the Court that, because I know that's going to become an issue while I'm gone. And I want to tell the Court what I know about that issue.

[6] **THE COURT:** I do not see any problem, if the government doesn't?

**MR. ISAACS:** Your Honor, for the record, what Mr. Flood is relating to the Court, is something that I am not aware of. And based upon my understanding of this case, the government believes that the Court follow along with 3143 and that I don't see any – I'm not making any such motion for that. I do not know of any basis on what – which Mr. Witte should be continued upon, at this point in time. So that is – unless there's – unless someone were to contact me concerning that matter, and I have talked with the agent as late as last week and no one has given me that impression at all.

**MR. FLOOD:** Well, in that regard, Your Honor, I'm –

**MR. ISAACS:** I'm not just – I'm not going to say that maybe something may not have been implied, but I believe it is encumbent upon me as the U.S. Attorney that has represented the government to have such information and that such a request be made, and no such request has been made.

**MR. FLOOD:** And I'm not saying that the agent is requesting it, Your Honor. And I want to make sure that the Court's under – aware what I am saying. I was talking with the agent about the cooperation in – if it becomes necessary. There is an agreement also, Your Honor, in this case, that if Mr. Witte is able to produce someone, that a recommendation of the government is going to be much lower than if he doesn't produce someone. [7] You see what I'm talking about, Your Honor?

**THE COURT:** Yes, sir.

**MR. FLOOD:** And so, I was talking with the agent about producing that person and he said, well you know he hadn't had any contact with him. We're hoping that he'll have contact with him soon, and I said, well, he'll have to be out to facilitate that conduct – that contact. And he said, yeah, he will. And so, I don't mean to be representing that the agent wanted me to speak for him and ask that he be released pending sentence. only saying that in order to cooperate, as he's agreed to do, it may be necessary for him to be released pending sentence. Now, 3143 as the Court's aware, states that if the sentence, under the statute for which he's being prosecuted and if the Court doesn't believe there's going to be an acquittal or anything like that, or a new trial, then the Court has to order him detained. However, in this case, it's a little different because there's going to be a 5K, Your Honor. So we don't even know whether or not there will be a recommendation as to a sentence of imprisonment, one.

**MR. ISAACS:** Your Honor?

**MR. FLOOD:** And, two, well – and, Bert, I'll give you a chance to respond. We had the same hearing in front of Judge Hittner not too long ago. And, two, it would facilitate his cooperation that he be released pending sentence. Now, he's not a danger to community and he's not a flight risk. The Court's [8] already found that in the giving of a bond to begin with. Mr. Witte has provide – abided by all the terms of his release, never has been a problem at all on release. Mr. Witte hasn't. And I'm just trying to tell the Court that I'm a little bit familiar with

what he's trying to get in this case, how much assistance he's trying to provide, and that assistance would be thwarted if he was to be held pending sentence. Basically, the agreement is, if he can get another individual who's in this indictment in here, and charged, the government is going to recommend three years, as a cap. If he can't, they're just going to give him a 5K. Do you see what I'm –

**THE COURT:** Yes, sir, I do.

**MR. FLOOD:** Right. And – and from what I understand, is this individual that he's supposed to be cooperating with is going to contact him. Well, he – you and I know that he can't be contacted while he's in the Harris County Jail pending sentence. So, that's – the way that I've gotten around that section of 3143 before, Your Honor – I don't mean to use the word "gotten around," but the way that the Court can interpret it is, one, because there is a 5K in the case, the government doesn't know whether or not they're going to be recommending jail time, two, because of cooperation, the amount of time that is going to be done is much less than the ten years as contemplated by the statute and so that it shouldn't fall under that statute. And then finally, his cooperation that he's agreed to do as part [9] of his plea of guilty, is thwarted because of his having to be in jail. So he's sitting here waiving his right to trial, waiving everything, pleading guilty, saying I'll cooperate, and then if the Court orders him to jail, he won't be able to cooperate. So that's why we're asking that he be released. This is all premature and I'm sorry to get into this, but it's just that I'm going to be leaving.

**THE COURT:** I'd rather have it thrashed out now, than later.

**MR. ISAACS:** Your Honor, one may it please the Court?

**(Pause)**

**THE COURT:** I don't like to race through this thing with Mr. Ervin needing to be in Judge Hearne's Court. Would you all like for me to recess this thing over the weekend?

**MR. ISAACS:** Your Honor, there's also – there's some other matters which – I really would like to get this – no, we've reset this several times.

**THE COURT:** I would too.

**MR. ISAACS:** The issue of – first of all, this is a Class B felony and under the statute 3561 it is not probatable. Period. There is no probation that can be involved here under Class B felony.

**MR. FLOOD:** It's a 5K.

**MR. ISAACS:** Even if there's a 5K, it is not probatable. That is the – that is the law and under the sentencing [10] guidelines, it says a Class B felony is not probatable.

**MR. FLOOD:** Well, I don't know that a 5K can avoid statutory restrictions, Your Honor. I understand that a 5K can avoid statutory restrictions?

**MR. ISAACS:** It does. It goes under – it allows the Court to go under a mandatory minimum. The 3561 is

explicit on itself. It says A and B felonies are not probatable. And that has been the interpretation of this District, the probation department and I –

**THE COURT:** Yes, we know, we also know that there's time and then there's time.

**MR. ISAACS:** But – and the bottom line, Your Honor, is that I think we've known this from – what Mr. Flood is talking about is something that I am not aware of. He has known from the day one, from the last time we were here, that the basis upon which we postponed this plea, was to permit these gentlemen to get their matters in order because upon plea, the agreement was, or the understanding was that the government was going to ask the Court to follow Title 18, Section 3143, and that these gentlemen would be incarcerated.

**MR. FLOOD:** I understand it, Your Honor, and that was our agreement. But, now it keeps him from abiding by the terms of his plea of guilty –

**MR. ISAACS:** Your Honor, I think –

**MR. FLOOD:** – if he's incarcerated?

[11] **MR. ISAACS:** Your Honor, that is not up to Mr. Flood to determine how much – how substantial assistance would be given. I think I've already stated on the record, for purposes of this, that Mr. Witte has done a substantial amount. If in fact, the government does not intend to question him any more, he – I expect he will probably get a – he will get his 5K. If we intend to question him any more and refuses to cooperate, that may be a basis, but at this point in time, he has done everything that we have asked so far; and if we ask him

any more, of course, he must continue through sentencing. But if we don't ask him of anything any more, he is going – I anticipate we're going to file that motion for the 5K. And it will come to this Court. But that – whether or not we want to continue any more with questioning of Mr. Witte is –

**THE COURT:** I think I'm primarily concerned, as is Mr. Flood, with whether he is presently eligible for continuation on bond, if he should plead guilty today? That's the only thing we're concerned about?

**MR. FLOOD:** Right. And I think that he is. And I think because of the 5K, the Court can find that there may be a possibility that there won't be a recommendation of jail time, and therefore 3143 can apply. And we had the same argument in front of Judge Hittner recently. And he – his exact ruling was, I understand your argument, I'm going to release him, but if Mr. Isaacs wants to appeal this case, it sounds like an issue right [12] for appeal. In fact, I think he requested that he appeal it and I'm glad that he didn't because I don't know what – what's going to happen these days with the Fifth Circuit. But, let – let me say this, Your Honor, very succinctly. If Mr. Isaacs is recommending to the Court right now that he is going to make a three year cap on this because he was able to bring in somebody, then fine, we'd say go – all right, we'll go start serving our time now. The problem is, is Mr. Isaacs is not going to make that recommendation unless he brings in this individual. He can not bring in this individual while he's in jail. And he cannot even contact this individual, he and agent – the agent in this case have decided that that individual is more than likely contact him. And he won't be able to be contacted if he's

in jail. And so it deprives him of that second part of this plea offer which is that he will get a three year cap if he is able to bring that other individual in.

**THE COURT:** Well, we are getting the cart before the horse, here.

**MR. FLOOD:** Yeah. And I'm –

**THE COURT:** I'm hearing that you think he's eligible to continue on bond and Mr. Isaacs is not sure whether he is or not. I think I can resolve the question very easily.

**MR. ISAACS:** Your Honor, may I be in – respectfully, I'm saying not that he's – I'm not sure, I do not believe he is.

**THE COURT:** All right.

[13] **MR. ISAACS:** Okay.

**THE COURT:** All right.

**(Pause)**

**THE COURT:** What do you all want to do? You all want to bring him up now, or not?

**MR. FLOOD:** Yeah, we can bring him up now, Your Honor.

**THE COURT:** All right. Come on up, gentlemen.

**MR. ERVIN:** Well, Your Honor, with regard to my defendant –

**THE COURT:** All right.

**MR. ERVIN:** – I had filed a motion to continue this hearing because, frankly, he is someone other than the individual named in the indictment. He has not been debriefed by the government yet. He has come forward with this information to me while I have been in this other trial.

**THE COURT:** All right.

**MR. ERVIN:** I have not been able to give this – this matter the attention that I would like to give it. I hear Mr. Isaacs saying this morning that he's willing to go through with the plea bargain, which is the same bargain that Mr. Flood describes.

**THE COURT:** I have no problem with continuing your matter. I don't want to rush your matter at all.

**MR. ERVIN:** Well, hopefully, Your Honor, he can be debriefed before he comes back in here.

[14] **THE COURT:** Well, let's have –

**MR. ERVIN:** He's committed –

**THE COURT:** – let's have Mr. Witte and Mr. Kelly come forward.

**MR. ISAACS:** Your Honor, there is another matter with respect to Mr. Kelly that (indiscernible).

**THE COURT:** I'm well aware of it. Mr. Kelly, your attorney is asking for addi – for some additional time so you that you can perhaps make some sort of arrangement with the agency. Is that satisfactory with you?

**MR. KELLY:** Yes, sir, it is, Your Honor.

**THE COURT:** I would be willing to reset it for a very short period of time?

**(Pause, Court and clerk conferring/whispering)**

**THE COURT:** Two weeks. Are you going to still be in trial?

**MR. ERVIN:** Gosh, I hope not Your Honor. This – the original projection on this was three weeks. We're now starting the sixth week next week and I haven't put on my case yet. So it's –

**THE COURT:** I'd – di –

**MR. ERVIN:** I – I'm hoping that it will be through in two weeks.

**THE COURT:** Does Judge Hearne work five days a week?

**MR. ERVIN:** Yes.

[15] **THE COURT:** I could set it in a late – at a late afternoon setting, or I could set it at a noon setting. But I want to get this thing moved in two weeks.

**MR. ERVIN:** Well, by late afternoon, you mean after 5:00, Your Honor?

**THE COURT:** Yeah.

**MR. ERVIN:** Somewhere around 5:30 or something? That would be ideal. Two weeks from now, that should give us plenty of time to accomplish –

**THE COURT:** Not on Friday, but how about on Thursday, two weeks from now?

**CLERK:** At noon, Your Honor, or 5:00?

**THE COURT:** Well, 5:30 would be better, or 5:15. Let's say 5:15.

**MR. ERVIN:** Yes, sir.

**CLERK:** Okay, that would be on March 5th.

**MR. ERVIN:** Yes, sir.

**THE COURT:** All right. Now that raises the next problem. Mr. Kelly has fallen out of repute with the New Directions Club. He's been drinking, he has violated the terms of the probation, and I am very concerned.

**MR. ERVIN:** May I say something about that, Your Honor?

**THE COURT:** Yes, sir. I also have the letter from Mr. Wallace indicating that he has a place to stay.

**MR. ERVIN:** Okay, Your Honor. Mr. Kelly has come to [16] see me several times since I have been in this trial in late afternoon and has been wringing his hands and distraught and distracted and – I really couldn't understand what the matter was, but I think what he was doing was working out in his own mind what he had to do, which was to – facing this business of 5K and debriefing, coming totally clean with the government and straightening his life out. He has a different identity. He's committed to that proposition now. He's – he's a different person now than he was before he came and told me this and we had decided what his course should be. I believe that the reason he was drinking and everything, is that he was emotionally distraught over the prospect of trying to

walk some kind of tight rope through all these proceedings and maintain an identity that's not his own. He's committed to exposing his identity and leveling with the government completely and cooperating in whatever way he can. And that together with the fact that he's been a good worker, has a place to stay. Harris County Jail is over crowded as it is. He's facing a 5K situation where he may very well need to be out of jail to accomplish something that could help him. But he hasn't been debriefed yet.

**THE COURT:** Have you seen his fingerprint return?

**MR. ERVIN:** No, sir.

**(Pause)**

**THE COURT:** I have been furnished a copy of the fingerprint return which indicates that the person with the same [17] fingerprints of Sam Richard Kelly has been known as Ralph Christopher Neal, has had a number of arrests and convictions under that name, has been known as Donald Lee Morton and has an arrest under that name. I can't let this man stay out on bond. There's no way in the world. I've got to revoke his bond. He's in custody of the Marshal, and we'll reset that until the date Ms. Richards just gave you. If you need some time, I'll give you the time.

**MR. ERVIN:** Yes, sir. I appreciate that.

**THE COURT:** But I think you need to get with the agent right away.

**MR. ERVIN:** Yes, sir.

**THE COURT:** I know how pressured you are. Get back there, to Court.

**MR. ERVIN:** Okay.

**THE COURT:** All right. You may stand aside, sir, Mr. Kelly. Well, let's talk to Mr. Witte now. Mr. Witte, have you been involved in all of these conversations and heard what we've been talking about as far as all of this, where you're going to fall in the Sentencing Reform Act and all of those problems?

**MR. WITTE:** Yes, Your Honor.

**THE COURT:** All right. Do you want to proceed with rearraignment at this time?

**MR. WITTE:** Yes, Your Honor.

**THE COURT:** All right, sir. First thing I'm going to [18] do is have you sworn in.

**(The Defendant is sworn)**

**THE COURT:** All right, sir, you understand that you're now under oath. I'm going to ask you some questions and the answers you give me must be truthful. If you fail to give me truthful answers, you can be charged with perjury. Do you understand that?

**MR. WITTE:** Yes, Your Honor.

**MR. HABERN:** Your Honor?

**THE COURT:** Yes, sir.

**MR. HABERN:** I will file a Motion on the matter, but I just learned this morning there's a misspelling of his name; the "I" at the end of his name should not be there.

**THE COURT:** All right let's go over that very carefully. Is your name Kurt Steven Witte?

**MR. WITTE:** Yes, Your Honor.

**THE COURT:** Do you pronounce it Witte?

**MR. WITTE:** Correct.

**THE COURT:** First name is spelled K-U-R-T?

**MR. WITTE:** Correct.

**THE COURT:** S-T-E-V-E-N?

**MR. WITTE:** Yes, Your Honor.

**THE COURT:** W-I-T-T-E?

**MR. WITTE:** Yes, Your Honor.

**THE COURT:** All right, Sir. Mr. Witte, how old a man [19] are you?

**MR. WITTE:** Thirty-nine years old.

**THE COURT:** And how much education have you had, Mr. Witte?

**MR. WITTE:** Um, completed high school education with a semester of college and real estate training.

**THE COURT:** All right. Have you ever been treated for drug addiction or mental problems?

**MR. WITTE:** No, Your Honor.

**THE COURT:** Have you come here today under the influence of any drugs or alcohol?

**MR. WITTE:** No, Your Honor.

**THE COURT:** Taken any medicine that might affect your mind?

**MR. WITTE:** No, Your Honor.

**THE COURT:** You've been represented by two very fine lawyers, Mr. Flood and Mr. Habern. Have you had a chance to go over this case carefully with both of them?

**MR. WITTE:** Yes, Your Honor.

**THE COURT:** Are you satisfied with the services and advice that they've been giving you?

**MR. WITTE:** Yes, Your Honor.

**THE COURT:** I understand now you have entered into a plea agreement with the government. Let's go over it once and for all to make sure it's understood. You've agreed to enter a [20] plea of guilty to Count II of the indictment and I'm going to go over the terms of Count II. That if you persist in that plea through sentencing, the government will dismiss Count I. Further, you are agreeing to cooperate in good faith with the government by providing truthful and complete information concerning this and other inferenc – offenses about which you might be questioned. If you're called upon to testify before a grand jury or in a trial concerning this, you will tell the complete truth. You will not withhold any evidence. The answers you give to any questions asked you will be the truth. If you satisfy the government that you have done that, the government will file a Motion to depart downward under the guidelines if you have substantially assisted. This would include departure below any mandatory minimum. And of course, if you fail to

honor that agreement, the government will not dismiss Count I and can proceed against you under Count I. Is that the plea agreement as you understand it?

**MR. WITTE:** Yes, Your Honor.

**THE COURT:** Mr. Habern, Mr. Flood, is that the plea agreement?

**MR. HABERN:** It is, Your Honor.

**THE COURT:** And, Mr. Isaacs?

**MR. ISAACS:** Yes, sir.

**THE COURT:** Other than that plea agreement, Mr. Witte, has anybody threatened you, coerced you or forced you in any way [21] to get you to plea guilty?

**MR. WITTE:** No, Your Honor.

**THE COURT:** Mr. Witte, this is a felony to which you are pleading guilty. No matter what the sentence I may give you, there are going to be some consequences to a plea of guilty to a felony. You're going to lose the right to hold public office, the right to serve on a jury, the right to vote and the right to possess fire arms. Do you understand that?

**MR. WITTE:** Yes, Your Honor.

**THE COURT:** All right, sir. Now, this case involves an offense which alleges – allegedly took place on or about February 8, 1991, and that means the Sentence Reform Act is in effect. And let me tell you how that's going to work. If you plead guilty, as you tell me you're doing here today, I will have the probation officer prepare a report. And the probation officer whose an

officer of the Court, doesn't work for the government, doesn't work for your side, will give us a presentence report. Your lawyers and Mr. Isaacs will have a chance to look at that report. That report will tell me all about you and all about this offense. And one of the issues that is going to be of great concern in that report is how much of the illegal product you're charged with. Because these guidelines scale the range of offenses based upon quantity among other things. And we're going to have a disagreement perhaps, between your lawyer and the government about how much you should [22] be charged with, as far as quantity. And I will resolve that at the time of sentencing. It's a fact question that I have to decide based upon what your lawyers tell me, and what the government's lawyers tell me, about the amount involved. That is, whether you should be penalized for the actual amount that you all dealt with, or in a greater amount because you discussed it or had it available or it was reasonably contemplated that it was involved in the case. Do you understand that?

**MR. WITTE:** Yes, Your Honor.

**THE COURT:** It's kind of complicated. Now, under the Sentence Reform Act, once the probation officer has made these calculations, they will tell me that there is a minimum sentence and a maximum sentence that I ought to sentence you within. The government, if they file that Motion for Downward Departure, will permit me to go below those guidelines. How far below those guidelines will depend upon the law, how I see the law, and how we all argue it out at the time of sentencing. And I'm not going to tell you right now whether this is a probatable offense, whether there's any chance of you

getting probation, because I'm not sure. Mr. Isaacs takes a position that there is no chance for probation. Your attorneys take the position that there is a chance for probation. But the one thing that I want you to understand is, I bear the responsibility of making the determination. If you don't like the way I sentence you, you have a right to appeal that sentence to the Court of Appeals. [23] And they may tell me I'm right, or they may tell me I'm wrong and send the case back for sentencing again. The government has a right to appeal the sentence if I go below the guidelines and they haven't requested me to do so. It's a little complicated. But I want you to understand. You have a right to appeal the sentence but you don't have any right to withdraw a plea of guilty, once you enter it. Do you understand that?

**MR. WITTE:** Yes, Your Honor.

**THE COURT:** I want you also to understand under the Sentence Reform Act, if you get a term to serve, you'll serve that term, because there's no longer any parole. It's been abolished. Do you understand that?

**MR. WITTE:** Yes, Your Honor.

**THE COURT:** Okay, sir. Now, you of course have a right to go to trial in this case on a plea of not guilty. At a trial it would be up to Mr. Isaacs to call witnesses and prove your guilt beyond a reasonable doubt. Your lawyers would not have the opportunity or the responsibility of proving that you're not guilty. That's not your burden. You could testify at a trial if you wanted to. But no one can force you to testify against yourself. If you wanted to bring witnesses to the Court to testify in your behalf, I could order those witnesses to appear. But

the main thing you should understand is, it would be up to the government to prove your guilt, beyond a reasonable doubt. Not your burden to prove that you're not guilty. Now, if you [24] plead guilty, as you tell me you want to do here today, there'll be no witnesses called, there will be no trial, no jury. In addition, you're going to have to admit what you did in connection with this Count II. Do you understand what your giving up by pleading guilty?

**MR. WITTE:** Yes, Your Honor.

**THE COURT:** All right, sir. Now, Count II of this indictment charges that on or about February 8th, 1991, here in the Houston Division, of the Southern District of Texas, you and Mr. Kelly aiding and abetting each other, that is assisting and helping each other, along with others, known and unknown to the grand jury, did knowingly and intentionally attempt to possess with intent to distribute more than 100 kilograms of marijuana, a scheduled one controlled substance. Now what this means is you're charged with aiding and abedding, that is, helping Mr. Kelly or his helping you, and other people perhaps, trying to, attempting to, possess this quantity of marijuana which is of course a Schedule I controlled substance. The government would have to show, since it's an element of the offense, that you did this knowingly and deliberately. That you did it intentionally. That is, you didn't do it by mistake, you didn't do it by accident, you did it knowing you were violating the law. Now, do you believe you understand what you're charged with?

**MR. WITTE:** Yes, Your Honor.

**THE COURT:** Attempting to possess? All right, sir. [25] Now, I am of the opinion that this carries a minimum sentence of five, is that correct?

**MR. ISAACS:** Yes, Your Honor.

**THE COURT:** And a maximum sentence of 40 years plus a possibility of a $2,000,000 fine. In addition, there's a requirement of four years of supervised release and a $50 special assessment. Now, what that means is, unless the government moves for me to depart downward, there's a minimum sentence of five years required under this Count and a possible maximum of 40 years. A possibility of up to $2,000,000 fine if I determine that there is a possibility of paying a fine. In addition, after any term of imprisonment, you will be on a form of probation called supervised release for four years. During that period of time, you can't possess fire arms, or violate any laws or any other terms of probation, or you can be brought back to court and sentenced to imprisonment again, with no credit for any time served. Do you believe you understand that?

**MR. WITTE:** Yes, Your Honor.

**THE COURT:** All right, sir. Now, what do the facts show, Mr. Isaacs, with regard to Mr. Witte?

**MR. ISAACS:** Your Honor, I anticipate the government would put to its proof. It would present witnesses that on or about the 25th of January, a special agent from DEA, Special Agent Norman, was contacted by the Defendant, Kurt Witte, via pager. Mr. Witte had talked to the undercover agent and talked [26] about purchasing a quantity of marijuana. That he stated that he

wanted to be sold to him by who he believed to be a drug dealer, the special agent. The quantity that was discussed at the time was a 1000 pounds. And that Mr. Witte subsequently talked – that telephone conversation, by the way was recorded, Your Honor. That on the 28th of January, 1991, Mr. Witte and Special Agent Norman contacted each other again for continuing negotiations concerning that amount. Mr. Witte indicated during that conversation, that he had raised the $50,000 and that there was a horse trailer which would be involved as part of this particular trade, this deal. And there would also be a motor home that Mr. Witte would use as a load vehicle that would be delivered. On the 5th of February, 1991, Agent Norman was again contacted by Mr. Witte. They spoke during the telephone (sic) again, and Mr. Witte had advised that he at that point in time, he was in Amarillo and that the motor home would be in Houston on Wednesday morning, February 6th, with the 50,000 in cash. On February 7th, again there was another contact with Mr. Witte here in Houston. And there the – there was surveillance, the deal was cut, a delivery was made of the load vehicle, the agents took the load vehicle and loaded it with 375 pounds of marijuana.

**(Pause, whispering)**

**MR. ISAACS:** I'm sorry, Your Honor. Prior to that, there was a meeting on the February 7th – I take that back – [27] in which Mr. Witte introduced Agent Norman to co-defendant, Mr. Kelly. There Mr. – and during that – also during that period of time, Mr. Witte had – was shown showed Special Agent Norman approximately $25,000 in cash. And this was at the La Quinta Inn on North Freeway here in Houston. At approximately 10:40

on February 8th, Special Agent Norman and another Special Agent Brothers, met with Mr. Witte and Mr. Kelly in Room 219 at the La Quinta Inn. Witte introduced Sam Kelly as the driver of the motor home, there was also some discussions concerning this particular deal. Special Agent Brothers and Kelly left and proceeded over to a mall where the motor home and the horse trailer were parked. Special Agent Norman remained with Witte at the La Quinta where again he was shown the $25,000 in cash. The motor home was then taken into possession by the DEA. At that time it was loaded with 375 pounds. It was then brought back. Upon arrival, Mr. Kelly took possession of the motor home and the horse trailer which were being utilized as load vehicles. And after taking possession of the motor home and the horse trailer, Mr. Kelly was arrested, afterwards, Mr. Wris – Mr. Witte was then arrested in the parking lot of the La Quinta. He was still in possession of the 25,000 and that was also seized as evidence.

**MR. HABERN:** May we be heard in response to that for a moment, Your Honor.

**THE COURT:** Sure.

[28] **MR. HABERN:** I'd like the Court to know that Mr. Witte only produced $25,000. He never produced the $50,000. And as to the amount, the 375 pounds, we don't dispute that. We don't know, my client never saw that amount, nor did he see the weed.

**THE COURT:** We know that it was more than a 100 pounds?

**MR. HABERN:** We know it was more than 100.

**MR. ISAACS:** Yeah.

**MR. HABERN:** The guy started grabbing him under the fence, Your Honor, yes.

**THE COURT:** I understand.

**MR. ISAACS:** What – excuse me, Your Honor.

**THE COURT:** Mr. Witte –

**MR. ISAACS:** More than 100 kilos.

**THE COURT:** I – more than 100 kilos.

**MR. HABERN:** I mean, 100 kilos right?

**THE COURT:** Which is 220 pounds. Mr. Witte, are those facts substantially what happened? If there's any part of it, you disagree with it, tell me?

**MR. WITTE:** Well, through out the course of the whole thing, the DEA agent was the one that initially made the contact with me. I did not initiate contact.

**THE COURT:** All right, sir. Other than that, was that pretty much what happened?

**MR. WITTE:** Yes, Your Honor.

**THE COURT:** All right. Are you pleading to this [29] indictment voluntarily, Mr. Witte?

**MR. WITTE:** Yes, Your Honor.

**THE COURT:** And, nobody's coerced you, nobody's forced you, nobody's promised you anything to get you to plea guilty of the –

**MR. WITTE:** No, Your Honor.

**THE COURT:** All right, sir. How do you plead to Count II of this indictment, guilty or not guilty?

**MR. WITTE:** Guilty.

**THE COURT:** Well, you're certainly a competent person, Mr. Witte, and I am going to find that you have entered a voluntary plea containing all of the essential elements. I'm going to set sentencing in this case for May the 8th, at 10:00 a.m. The government still take the position that this is not – that he is not eligible to continue on bond?

**MR. ISAACS:** Yes, sir.

**THE COURT:** I would like to ask, Mr. Grimaldo, have you been dealing with Mr. Witte?

**MR. GRIMALDO:** No, sir, Your Honor, we have not. However, if he continues on bond, our Pretrial Officer will continue to supervise him. I'm not sure if he's here in Houston?

**MR. HABERN:** He's in Colorado.

**THE COURT:** He's still in Colorado?

**MR. HABERN:** He owns a business there, Your Honor.

**(Pause)**

[30] **THE COURT:** Well, over the government's objection, I am going to believe – I am going to find that he is – he has by his continued cooperation remained eligible to stay on bond. If it should turn out I'm incorrect, I'm sure I will be disabused of my present belief. I will permit you to stay on bond –

**MR. WITTE:** Thank you.

**THE COURT:** – Mr. Witte. With that, we'll stand in recess. Mr. Kelly is remanded to custody. Do we have – let's see do I have the original of the plea of guilty form? I believe I do. It's the one that's already edited here. Yes. Let's have that signed.

**(Pause)**

**THE COURT:** Yes. Mr. Habern, we're going to give you a set of our standard conditions of supervised release.

**MR. HABERN:** Thank you, Your Honor. I'm – I am familiar with them.

**THE COURT:** I'm sure you do have them.

**(Pause)**

**THE COURT:** Mr. Flood and Mr. Habern, it would behoove you to stay in very close contact with the agent to make sure that the agent is cooperative when the issue of continued bond is raised.

**MR. FLOOD:** Yeah, that matter, and I think also matters dealing with what we discussed here today.

**THE COURT:** Continued cooperation. All right. That [31] concludes this proceeding. We'll stand in recess.

**MR. FLOOD:** Thank you, Your Honor.

**MR. HABERN:** Thank you, Your Honor.

**MR. WITTE:** Thank you, Your Honor.

**(End)**

(Certificate Omitted In Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

(Caption Omitted In Printing)

(Filed Aug 13, 1992)

SENTENCING

BEFORE THE HONORABLE NORMAN W. BLACK, U. S. DISTRICT COURT JUDGE

* * *

[1] **THE COURT:** All right. Let's take *United States versus Sam R. Kelly* first. Mr. Ervin for Defendant.

**MR. ISAACS:** Your Honor, Bert Isaacs representing the Government.

**THE COURT:** Mr. Isaacs for the Government. All right. I understand the Government has a motion in this case. Is that correct?

**MR. ISAACS:** Yes, Your Honor. Pursuant to our Plea Agreement, Your Honor, the Government had agreed that if Mr. Kelly would be – be willing to debrief with the Government and talk about this or any other matters, that at sentencing the Government would submit to the Court a 5K recommendation without any recommendation on sentencing. And at this time it's the Government's position that Mr. Kelly has lived up to his part of the agreement, and he's always been ready, willing, and able to testi – to cooperate with the Government and has never ever reneged on that promise.

**THE COURT:** No objection, Mr. Ervin?

**MR. ERVIN:** No objection, Your Honor.

**THE COURT:** All right. Mr. Kelly, on the Government's representation that you have been willing to testify in this case and that you are continuing to cooperate, I'm going to grant the Government's Motion to Depart Downward from the guidelines. I'm sure Mr. Ervin has explained what that means to you.

**DEFENDANT KELLY:** Yes. He has, Your Honor.

[2] **THE COURT:** All right. Have you gone over the Pre-Sentence Report with him, Mr. Ervin?

**MR. ERVIN:** Yes, sir. I have.

**THE COURT:** All right. Familiar with all of that?

**MR. ERVIN:** Yes, sir.

**THE COURT:** All right. I notice you have some objections in the case. Let's go over those briefly. I'm not sure that they are as significant now, the Government having moved to depart downward, as they might have been.

**MR. ERVIN:** Yes, sir.

**THE COURT:** One of your objections is, of course, that there is testimony – there is information in the Pre-Sentence Report that relates to other alleged transactions that Mr. Witte is – I mean, Mr. Kelly is not involved with but Mr. Witte, his co-defendant, is allegedly involved with. And certainly that information is not relevant to Mr. Kelly and will not be considered in any way against him. So your motion, or your objection to that part of the report as to Mr. Kelly is sustained.

**MR. ERVIN:** Thank you, Your Honor.

**THE COURT:** I believe that covers all of your initial objections. Your –

**MR. ERVIN:** Just as to Number #7, Your Honor, an argument that the Court is – is well aware of and that had been discussed previously, that – that the relevant conduct should concl – include intent to possess – possession with intent to – attempt [3] to possess with intent to distribute 375 to 380 pounds of marijuana rather than considering the thousand pounds that was originally discussed. The rationale being that that is the amount actually possessed, and I don't believe that discussion of – of a thousand pounds is relevant conduct.

**THE COURT:** I disagree. I would overrule that objection. I think those discussions did involve a thousand pounds. I'm going to make sure, however, that it is not relevant to the sentencing; but I do believe it's relevant conduct under the guidelines.

**MR. ERVIN:** Thank you, Your Honor.

**THE COURT:** You're also objecting to the limited scope of his participation and believe he should be given credit for minor partici – being a minor participant. I think the fact that his participation is limited only to the amount of drugs involv – or the amount of marijuana involved in this case sufficiently limits his participation. And that giving him a minor participation would give him too much reduction.

**MR. ERVIN:** Yes, sir.

**THE COURT:** I understand this prior conviction only involved verbal assa – verbal assault and not physical assault?

**MR. ERVIN:** Yes, sir.

**THE COURT:** That's noted. The fact that he was not under sentence of probation when the incident offense was committed –

**MR. ERVIN:** Yes, sir, I fail to see how he was under a sentence of probation at the time the offense was committed. It [4] may be that the Probation Officer is considering the one-year probation that he got subsequent to the time that the offense was committed in determining that. But I just don't see how he's under a sentence of probation when this offense was committed.

**THE COURT:** Let's see. He was placed on one year's supervised probation October 3, 1991.

**MR. ERVIN:** That would – and the offense is February of 19 –

**THE COURT:** How about that, Mr. Vela?

**MR. VELA:** Your Honor –

**THE COURT:** Are we – you understand what we are discussing now is whether at the time of this alleged offense he was still under probation for his October, 1991, conviction?

**MR. VELA:** It does not ap – it would not appear that he was, Your Honor, now that he made this – he's corr – he's correct on this matter. Being that he was arrested under his alias, another alias –

**(Off the Record whispering)**

**THE COURT:** He was indicted for Count Two on or about February 8, 1991. So I assume he was not then on probation. He was placed on probation later.

**(Off the Record whispering)**

**THE COURT:** Is that correct?

**MR. VELA:** Yes, Your Honor.

**THE COURT:** I think that is correct. All right. That [5] objection is sustained.

**MR. ERVIN:** That would reduce, Your Honor, his – his criminal history category from a Four to a Three.

**THE COURT:** All right.

**MR. ISAACS:** Just so the record is clear, Your Honor, this offense that was part of the – that offense was committed while he was on bond –

**MR. VELA:** For the instant case.

**MR. ISAACS:** – for the instant case.

**THE COURT:** The other offense was allegedly committed when he was on bond in this case, rather than the other way around?

**MR. ISAACS:** Yes, sir.

**MR. VELA:** Yes, sir.

**MR. ISAACS:** Correct.

**THE COURT:** I see. All right. So if he's at a Level 26 Category 3, he would be at 78 to 97 months, if I read the chart correctly.

**MR. ERVIN:** Yes, sir.

**THE COURT:** All right. That is so noted. Now, is there anything else you'd like to tell me in his behalf, Mr. Ervin, then I'll hear from him?

**MR. ERVIN:** Well, Your Honor, I would just like to observe generally that – that he has an extensive criminal history, a relatively extensive criminal history. He also, as the Court well knows, was indicted in this case under an alias.

[6] **THE COURT:** What is your correct name?

**DEFENDANT KELLY:** Ralph Christopher Neal, sir.

**THE COURT:** Rife – Ralph Christopher Neal is your correct name?

**DEFENDANT KELLY:** Yes, sir. It is.

**MR. ERVIN:** I – I would just argue, Your Honor, that – that he made a step toward rehabilitation when he decided that he no longer wanted to indulge this fiction and brought it to my attention that he was someone else. I, in turn, brought it to the Prosecutor's attention and to the Court's attention and – in a hope that the Court will consider that in sentencing. He's – he's gotten a little older and a little wiser, and I think made a step in the right direction. And – and I believe he's a good person who will never engage in this kind of activity again.

**THE COURT:** All right, sir. Mr. Kelly, is there anything you'd like to tell me – Mr. Neal?

**DEFENDANT KELLY:** Yes, sir, Your Honor, there is. I'm sorry for what I've done. As Mr. – Mr. Ervin said, I do want to straighten my life out, and that's the reason I've brought myself forward and – and my true identity, so that I can clear up all the problems that I've caused; all that is possible.

**THE COURT:** Well, I hope you'll do it, Mr. Neal.

**DEFENDANT KELLY:** Thank you, Mr. Black.

**THE COURT:** Anything further from the Government?

**MR. ISAACS:** No, Your Honor. Except that one thing that [7] the Government make a motion that all of the documents in this case will true name the Defendant as Ralph Christopher Neal.

**THE COURT:** All right. All the documents then will be amended to show that his true name is Ralph Christopher Neal. Mr. Neal, on the Government's Motion to Depart Downward I'm going to sentence you to 60 months to serve in the custody of the Attorney General, to be followed by a period of supervised release of five years. During that period of supervised release, you will abide by the standard conditions of supervised release. You will have such drug or alcohol after care as the Probation Officer deems appropriate. I will impose a special assessment of $50, but I will not impose a fine because I don't think that there's any likelihood that you can pay a fine. I find that the facts set out in the Pre-Sentence Report are correct, except for those that I have sustained objections to. Thank you, Mr. Ervin.

**MR. ERVIN:** Thank you, Your Honor.

**THE COURT:** Good job for your client.

**MR. ISAACS:** Your Honor, one other matter. The Government presents the agreement – tenders a Motion to Dismiss the remaining counts.

**THE COURT:** All right. That will be granted. And, for the record, I'm denying the Motion to Continue the sentencing. Mr. Neal is remanded to custody. Marshal, can you see that he is carried under his correct name?

**MARSHAL:** Yes, I will, sir.

[8] **THE COURT:** And, of course, you have a right to appeal the sentence, Mr. Neal, and if you choose to do so, the Clerk can enter a Notice of Appeal for you.

**DEFENDANT KELLY:** Yes, sir, Your Honor. Thank you.

**THE COURT:** Thank you very much. Good luck to you.

**MR. ERVIN:** Your Honor, just one matter. Mr. Vela just asked me, and I wanted it clear, I want all the records, including the PSI, that the true name of Mr. Neal.

**THE COURT:** Yes. All right. And now have Kurt Steven Witte. Mr. Habern?

**MR. HABERN:** Bill Habern for Defendant Witte, Your Honor.

**MR. ISAACS:** Your Honor, again, Bert Isaacs, representing the United States.

**THE COURT:** All right. Mr. Habern, have you gone over this Pre-Sentence Report carefully with your client?

**MR. HABERN:** We have gone over the Pre-Sentence Report together, Your Honor, and have –

**THE COURT:** And have you told him about all the extensive discussions we have been having about the language in the Pre-Sentence Report concerning alleged "Other Transactions"?

**MR. HABERN:** That has been discussed with the client in some degree of detail, Your Honor.

**THE COURT:** All right. Why don't you tell me, for the record, whatever you have to say. And then we'll discuss it on the record.

[9] **MR. HABERN:** All right, Your Honor. We have filed an objection are you speaking of objections to the case, Your Honor?

**THE COURT:** Yes, sir.

**MR. HABERN:** All right. We have filed a series of objections to the – to the -- our first objection is based upon the – the first objection I wish to take up with the Court, if I may find my place here, is the fact that we have not had the opportunity to review materials upon which the Level 42 is based. That leaves me in the position, Your Honor, of, quite frankly, not having detailed knowledge of those facts. And we have asked for discovery of those facts. And I would renew, for purposes of the record, my request to be able to review those matters with my client.

Secondly, as to the denial of the two points for relevant conduct. The mention of any additional material contained that – in the, "other material," if I might put it that way, and the Court knows what I'm referring to, that was certainly not part of Mr. Witte's discussion based upon his reliance and our reliance on the Government's information that, "other information," would not appear in the PSI. As a result, he's been denied that two-point decrease. We would ask the Government to join us in the consider – asking the Court to consider granting that two points based upon the fact that he relied, or his detrimental reliance was based upon information given him by the Government. And, secondly, [10] that he relied on our recommendation based upon the assurances of the Government that that would not be a part of – of – of the record. We find ourselves in a situation where the advice given has bitten both of us.

Thirdly, I am somewhat at a loss with regard to Objection 2 on Page 4 of my Objections, as I again have not seen access – I have not had access to information relative to that. The same applies as to the Objection Number Three. I'm sorry, there is no Number Three, so that would be Two that I'm speaking of. I misnumbered. Particularly as to the – the five, I believe, issues that we think are minor issues, but are mentioned in the – in the second objection. Objection Four, "these matters," again, that refer to others persons (Indiscernible) the party, to which I – I fear we still have no information in order to respond. As to Objection Five, I had stated in the Written Objections; we'd like a ruling on that, as we would the others. We – we stand on the objections we filed, and I guess we'll ask the Court for a ruling on those, including

the opportunity to review documents in – in order to advise the client on the basis of these things and see what he would have to say to me against it. Primarily, we are also concerned about the two points. Thirdly, we would like to make argument, of course, about the guideline level that would be appro – that would be proper in this case and what would be an appropriate sentence when that time arrives, Your Honor.

**THE COURT:** Go right ahead.

[11] **MR. HABERN:** All right. Based upon the amount actually possessed in this case, Your Honor, which was 370 some-odd pounds, Mr. Witte brought to this conspiracy $25,000 to purchase 375 pounds. The amount possessed was, in fact, that amount. As contemplated by the Pre – Plea Agreement, this would be approximately 1126. And when included his two points to a – a voluntary acceptance, which we anticipate should be granted in this case based on information provided to the Court, that would be a Level 24. He also is entitled, we understand, to a 5K recommendation to the Court by the Government in this case. In the Seventh Circuit case of *U.S. versus CEA*, C-E-A, found at Number 91-1492, issued 5 of '92, they – the Court makes mention of Section 2D1.4 where in a situation of an uncompleted transaction, that the amount the defendant did not produce and was not reasonably capable of producing should be the amount upon which the sentence is imposed. In that case, there was a cocaine matter where the client, or the defendant, only brought part of the money into the cocaine or the transaction, though he was sentenced for the full amount. It was an un – it was like this case. It was an uncompleted case. And the Court held that he should

only be sentenced based upon that which he could produce and was reasonably capable of producing. In this case, what Mr. Witte's been able to produce is $25,000 to buy 370 pounds; and our position is that we would hope the Court would impose that sentence upon him, with a two-point reduction and a 5K consideration. This would bring him [12] down to a base level, if the two points were granted, of a Level 24 based on my calculations, Your Honor. I have known Mr. Witte since the period of my involvement in this case after the plea was – was reached, and I – and I said to him for the DeGeurin firm. I attended the debriefing with him where Agent Norman said of him that of the people with whom he was involved, he was the one most impressed – that most impressed Agent Norman as not being typical of the group. I think that speaks true of Mr. Witte. I would like to call the Court's attention to Mr. Witte's family. Would you stand please, ladies and gentlemen? They have come from various parts of the United States to be here this morning. To say this has been a traumatic event for the family is an understatement, as these matters always are. Mr. Witte has opened a business in Colorado in the last couple of years, has married, has a family; and, of course, these things are always difficult for all of those persons concerned. The family is here today in support of Mr. Witte. Mr. Witte understands, based on the meeting this morning, the nature of how things have turned in this case. I am somewhat at a loss to – to express to the Court the deepness of my feelings with regard to what I have found to be a fellow seriously trying to reform his life; who the DEA Agent indicated was the fellow least like the other people in the conspiracy; who has a family; who

has a job; and – and who wants to get this behind him and move on. Now facing what could be at his age a turn in his life that would be a drastic and disastrous situation for him. When, in fact, our [13] detrimental reliance on representations of the Government going in; and our efforts have been less than what we anticipated. I'd ask the Court to consider all of those matters, particularly in light of what – of what we are – what we are facing. With the 5K departure at a Level 24, if the Court would see our argument, we could get out, we would hope, with under 50 months in this case, if the Court could see its way to do that with a 5K. We think with Mr. Witte's willingness to participate in further necessities if the if the Government would call on him to be available is there, and we would hope that based on what the Court is aware of in this case, that a sentence within the 50-month area would be one that the Court would consider.

**THE COURT:** Let me hear from Mr. Isaacs on the subject of the departure, and then I'll hear from Mr. Witte.

**MR. ISAACS:** Yes, Your Honor. If the Court will allow me subsequently – the Court – the Government, pursuant to its agreement, intends to recommend to this Court for purposes of this case, the mar – this marijuana case in which Mr. Witte has been charged with and has pled guilty in this Court, is submitting a 5K based upon his agreement to debrief, and he has debriefed. And pur – and this 5K will be submitted to the Court without any recommendation on sentence. This 5K has nothing to do with any other matters pending in this jurisdiction or any other jurisdiction or may be pending in this or any other jurisdiction. It only has to do with

this particular case. And with that stated [14] on the record, Your Honor, we submit that 5K to the Court.

**THE COURT:** All right. On the Government's representation that Mr. Witte has been fully debriefed in this case; I'll grant the Motion for Downward Departure under 5K1.1. Now, would you like to, after you hand that up –

**MR. ISAACS:** Yes. Your Honor, I'm looking for the copy of the Order.

**THE COURT:** I trust that there is no objection to the – from the Defense to this –

**MR. HABERN:** No objection, Your Honor. May – may I inquire of the Prosecution if they would also consider a comment on the two-point departure for – or two-point downwards?

**THE COURT:** I expect Mr. Isaacs will do so.

**MR. HABERN:** Thank you, sir.

**THE COURT:** Mr. Isaacs is looking for the order that goes with the motion.

**MR. ISAACS:** Yes, Your Honor. If you – if the Court will indulge – here it is.

**THE COURT:** All right.

**MR. ISAACS:** May I continue, Your Honor?

**THE COURT:** Yes, sir.

**MR. ISAACS:** With respect to the other matters here, the Government must differ both with Mr. Habern and, also, with the Pre-Sentence Report; and I'd like to

take them in sequence, Your Honor. With respect to Mr. Habern's representa – statement to the [15] Court that he was relying upon representations to the Government, I must remind the Court that number one, the Government has never, ever made any representations in private or on the record to this Court that anything that the Government was recommending or was part of the Plea Agreement would in any way impact on the Pre-Sentence Report's outcome. It was stated specifically that anything that we agreed to we had no control over what the resultant PSR, or the Pre-Sentence Report, would be. We have never stated at any time that Mr. – that the PSR would – or this Court would accept the Plea Agreement. And I believe that the Court when it admonished Mr. Witte at the Plea Sentence stated, on the record, to Mr. Witte that at any time anything that the Government recommends, anything that's in a plea agreement, is a recommendation; that I can accept it or reject it. And if I reject it, you cannot withdraw your plea; and I may sentence you up to the maximum on – under this offense. And I believe the record will reflect that Mr. Witte acknowledged that he understood that. With that said, let me make a clarification as to what the Government did agree with. The Government, with respect to the amount of marijuana involved in this case, the Government agreed on the record that this was a conspiracy involving 1,000 pounds of marijuana. The Government also stated on the record that the only amount of marijuana actually delivered to the defendants was approximately 375 pounds. That was stipulated to on the record both on the record and in private to the Defense Counsel. With [16] respect to the issue of acceptance or responsibility, the

Government also stated that based upon the fact that Mr. Witte was pleading guilty to this offense, it is the Government's belief that he has accepted responsibility for this particular offense. However, the Government never, ever stated, as I stated it earlier, that this would in any way bind the Court or the P – the Pre-Sentence Report rider. And that that was merely a recommendation to the Court that the Court must accept. So Mr. Habern's representation or statement to the Court that he was relying on the fact that the Government committed to making sure that these things wouldn't be taken into consideration by the Court or wouldn't be reflected in the P – in the PSR, I believe is errone – is in fact a misstatement of fact. And it is not something that we had agreed to. And I think he understands that as well. That is the law; that was what we stated on the record. So with that stated, that was the agreement with respect to the amount that was involved. That was also the agreement with respect to the stipulation as to his acceptance of responsibility. With respect to the PSR, Your Honor, it was the Government's position, and this is in particularly with represent – with reference to Paragraph 35 where the offense level is comp – computed based upon an offense which all through this matter the Government has always stated was not part and parcel in any way of this particular offense. And the Government will rely to show to the Court the basis upon which it is talking about is that the cases that are here in this [17] jurisdiction, specifically *United States versus Maraboe*, M-A-R-A-B-O-E, which is 578 Fed.2nd 151, Fifth Circuit case, 1978, and *United States versus Nichols*, which is 741 Fed.2nd 767, Fifth Circuit, 1984. That there are five factors which must be taken into consideration, and those

five factors, in viewing this with the offense which is charged as relevant conduct in this offense, clearly show that these are separate agreements and separate offenses. And I'd like to read them into the record if I may. One factor is the time. These offenses were committed at completely separate times; that the persons acting as co-conspirators are different individuals. With respect to this case, Mr. Witte was in cahoots with Mr. Kelly, or Mr. Ralph Neal, on this particular offense. On this case N – Number 35, he was involved with other individuals. So this is – that goes to that issue with respect that the statute of offenses charged in the indictments are, in fact – there are no two – there aren't any other indictment, but that other offense charges an offense could possibly charge an offense which is completely different than this. And I state just for – as an example on the record that there could be a possibility that that would be an importation count, rather than the offense which he has here. Another thing is that the overt acts charged by the Government or any other description of the offenses charged which indicates the nature and scope of the activity which the Government sought to punish in each case. The overt acts in both of these offenses are in no way connected, in [18] any way connected. They are completely separate. The overt acts that Mr. Witte committed in this particular offense have nothing at all to do in any significant manner with the offenses that could possibly be charged in this offense which is taken into consideration in Paragraph Number 35. And finally, Your Honor, the places where the events alleged as part of the conspiracy took place; they happened at different times and different places with different parties. So it was based upon that

there is the – the issue is is that what is shown in 35 we do not believe is relevant conduct with respect to this particular offense. However, as the Government understands, it has no control over how relevant conduct is interpreted with respect to the PSR. It's just for purposes of making a record at this time, Your Honor, is – the Court is understanding that it is not intended, it has never at any time intended to prosecute or hold Mr. Witte responsible for the conduct in – in Paragraph Number 35 with respect to this particular offense. And that's – that part I differ with the PSR rider. And I think that's about – that's all I have to say, Your Honor. Thank you.

**THE COURT:** Mr. Witte, I'm curious; do you know what all this is about?

**MR. WITTE:** Yes, Your Honor, I do.

**THE COURT:** Do you know that both your lawyer and the Government's lawyer are trying to convince me to disregard all of the talk about anything except this particular little marijuana [19] deal, but for different reasons? Your lawyer wants me to disregard it so that I'll reduce your sentence in this case. The Government's lawyer wants me to disregard it so he can indict you in another case if he wants to. Do you understand that?

**MR. WITTE:** Yes, Your Honor.

**THE COURT:** That's kind of unusual. I'm going to remember you because this is the first time that's ever happened in my Court. What would you like to tell me?

**MR. HABERN:** Your Honor, before he speaks, as the Court is aware, I was not a party to this case until after the plea bargain was cut. Mr. Chris Flood was

involved at that point, and I find myself to a degree to a disadvantage. He has asked if I would ask the Court if he could address one brief matter before the Court.

**THE COURT:** Of course.

**MR. FLOOD:** Thank you, Your Honor. Chris Flood, for Mr. Witte also. Just in response to Mr. Isaacs' statements and I think the Court has hit the nail on the head. I think it would be improper to, based on the representations of the Government all along in this case, to consider what's been included as relevant conduct in the Pre-Sentence Report for the following reasons: One, to deprive him of the ability to plead not guilty to that conduct at some further time down the road. That is if in the event Mr. Isaacs does choose to indict him for that unrelated conduct, then he has an opportunity to plead not guilty and go to trial in that [20] case if that becomes necessary. The Court – punishing him for that conduct based on a plea of guilty in this case I think would be improper, especially in light of all the – the representations that it's been not relevant conduct. Now I understand the Probation Department's job in preparing the Pre-Sentence Report, and I understand this Court's job in interpreting what is relevant conduct under the guidelines. But I think that this Court should disregard the so-called relevant conduct in this case for the reasons that I've stated and for the fact that when contemplating the plea – the Plea agreement between Mr. Witte and the Government, he, of course, exchanged his right to a – a trial by jury and came in and pled guilty to this Court with the understanding that it was not relevant conduct. And I think it would affect somewhat the voluntariness of his plea. Now I know it was represented to the Court –

I mean to the Defendant, at the time that the Court is not bound by the Plea Agreement. I am fully aware of that. However, the discussions were at the time that the conspiracy was for a thousand pounds, that the actual amount possessed was 375 pounds, and that the guideline range would be based upon those amounts, and that if he wanted to cooperate with the Government so that the guide – the statutory minimum did not bar this Court from going below five years, then he can come in and cooperate with the Government, which he has done; and as Mr. Habern pointed out, which he has done successfully. I don't think that the Court should anticipate a charge by the Government further down [21] the road, and either one, try to help Mr. Witte by taking it into consideration and going up from the contemplated sentence before the Pre-Sentence Report was prepared. But if the Court feels bound to take the relevant conduct into consideration, then why don't we allow that to be a future fight on a plea involved down the road. And as Mr. Habern pointed – is pointing out to me now, the relevant conduct burden of proof at sentencing is by a preponderance of the evidence, whereas at trial it'd be beyond a reasonable doubt. And so what you're basically also doing is making a lesser burden of proof on the part of the Government. If you're going to sentence him for that relevant, so-called relevant, conduct that's now come up late in the game. But my only concern was, Your Honor, and I think the reason why they've called me to be here, is that he has pled guilty to this case. And all along it's been maintained that these are the facts in this case. And while the Probation Department, I'm sure, does an excellent job preparing the Pre-Sentence Report; and

while this Court may even consider that conduct in the succinct sentence, I think in order to insure the voluntariness of the plea the Court should consider along the contemplated range of conduct in light of the 5K departure. I think this Court's able to do so. If the Court doesn't have any further questions of me, I'll sit down.

**THE COURT:** No.

**MR. HABERN:** Thank you, Your Honor.

**MR. FLOOD:** Thank you, Your Honor.

[22] **THE COURT:** Anything further?

**MR. ISAACS:** Nothing from the United States, Your Honor.

**MR. HABERN:** Mr. Witte might like to address the Court, Your Honor; I'm sorry.

**THE COURT:** All right. That's fine.

**DEFENDANT WITTE:** It's – I'm duly sorry for – for – for any crimes that I have committed here and for the grief I've caused myself and my family. And – I'm – I'm here today to accept what penalty that the Court deems necessary for me. Now it was my understanding through – through conversations with my attorney at the time, Chris Flood, and Mr. Isaacs here, that in exchange for my cooperation with Agent Norman that I would have immunity from prosecution from any other cases.

**MR. ISAACS:** No. Your Honor, that was – I –

**MR. FLOOD:** That's not included in the plea papers, Your Honor. And whether that was a miscommunication on my part or a misunderstanding on Mr.

Witte's part, that – that shouldn't even be considered. That – that's the – that's further down the road; and I think, as you've stated, if the Government attempts to prosecute him for another unrelated offense, then that's a – that's a different fight altogether, and it's not for this Court even to anticipate what the results would be in that case. I don't want the Court to attempt to assist the Defendant in saying, "Look, I'm going to go ahead and take the related conduct into consideration."

[23] **THE COURT:** I'm not here to help the Defendant.

**MR. FLOOD:** Yeah. I know – I know that, Your Honor. I'm not – I'm not implying that. What I'm implying is that I don't want this Court to try to anticipate what may happen in the future. And – and that –

**THE COURT:** I learned a long time ago, Mr. Flood, not to try and to do that.

**MR. FLOOD:** Thank you, Your Honor.

**MR. HABERN:** Your Honor, if I may – if I may have one more minute of the Court's time? The family has come from various parts of the country to be here. This Court's going to impose a prison sentence, and we're aware of that. Mr. Witte has been on bond; he's been a cooperating witness. He is still trying to assist in – in one certain way which has not come to fruitation (sic) yet, but he continues to. We would ask the Court to consider allowing Mr. Witte a voluntary surrender. And if the Court could not allow that to occur, that he be allowed to turn himself in Monday while he could visit with his

family over the weekend in Houston subject to any conditions the Court would want to impose. And, finally, if the Court could see itself clear to request a recommendation, and we clearly understand it's a recommendation, to a prison facility operated by the Bureau of Prisons somewhere near his home in the Colorado area. The Court – we would very much appreciate the Court's consideration.

**THE COURT:** Anything further?

[24] **MR. ISAACS:** Your Honor, just with that last factor. I don't believe under 3018, United States Code 3143, if Mr. Witte is sentenced to a prison term that the Court must sentence him – must put him in the custody of the Marshals. I just merely cite Section 3143B; and, basically it says that if he has been found guilty and sentenced to a prison term then he should go into – he should be put into the custody of the Bureau of Prisons, custody of the Marshals and bond revoked at this point in time, unless that by some evidence that there's some showing that his conviction will be overturned, and some other matters which –

**THE COURT:** Extraordinary circumstances?

**MR. ISAACS:** Yes, sir.

**MR. HABERN:** We would urge the Court that we – we're certainly aware of the law. We really would urge the Court to consider the family circumstances of their being here; or maybe ask the Court to defer entering an order until Monday morning if that would not be impossible, so that he could have at least the weekend with his family.

**THE COURT:** All right. Counsel, as you all well know, I have given this matter a great deal of thought; spent a lot of time with the Probation Officer. The Probation Officer did an outstanding job in this case of analyzing all of the facts which came to her attention, and that is what the Sentencing Reform Act requires. When Congress passed that statute, they mandated that the Probation Officer be independent of counsel, independent of the [25] Government, and in – in fact, independent of the Court in preparing these Pre-Sentence Reports. And our Probation Officer has made me very proud of the job that they do. While both sides have their own reasons for wanting to disregard the facts that the Probation Officer has included in this Pre-Sentence Report, the facts exist; and I find that they are true by a preponderance of the evidence. I cannot disregard them. I don't think Counsel and Defendant, Mr. Witte, has shown any grounds for withdrawing the guilty plea; and I deny that Motion to Withdraw. I do grant the objection to the failure to give acceptance of responsibility. I will give him credit for acceptance of responsibility. That still puts him at a Level 40, with a range of 292 to 365 months. Incognizant of all of the facts of this case, and I adopt the remainder of the Pre-Sentence Report as accurate, and also being cognizant of Rule 35, I'm sentencing Mr. Witte as follows: He is to serve 144 months in the custody of the Attorney General to be followed by a period of supervised release of five years. During the period of supervised release, he's to abide by the Standard Conditions of Supervision adopted by this Court and take part in any drug after-care program that the Probation Officer deems appropriate. I'm not going to impose a fine in this case because I think his

family needs his assets more than the Government does. I am going to impose a special assessment of $50.

This relevant conduct that the Probation Officer spells out in this report is, in my opinion, relevant conduct related to the [26] charge to which he pleaded guilty. The other objections, if any, are overruled.

As to voluntary surrender, I believe the fact that Mr. Witte has cooperated with the Government so well and has shown a good attitude toward assisting the Government in this rather complicated case, I find that there are extraordinary circumstances. I will permit him to remain on bond until notified when to appear at an institution. I will not, however, make a recommendation as to the location, since the Bureau of Prisons seriously endeavors to put people near their homes; and they have simply been ignoring my recommendations anyway because the institutions are so crowded. Of course, Mr. Witte has a right to appeal the sentence, and if he requests the Clerk can enter a Notice of Appeal in his behalf. The form he is signing is his solemn assurance that he will appear when ordered to do so; and, Mr. Habern and Mr. Flood, you will explain to him what happens if he doesn't. Government has now moved to dismiss a count to which he has not pleaded guilty which is Count One, and I am signing that Order. Thank you, Counsel. Good luck to you, Mr. Witte.

**DEFENDANT WITTE:** Thank you.

**MR. HABERN:** Thank you, Your Honor.

**THE COURT:** We stand in recess.

**MR. ERVIN:** Your Honor, may I go back on the record in Mr. Kelly's case for just a – just a moment?

**THE COURT:** Sure. This is Mr. Ervin.

[27] **MR. ERVIN:** Yes, sir. Don Ervin, for Defendant Kelly. Your Honor, I simply forgot to do something, and I apologize to the Court. I wanted to ask the Court to give on a Judgment Sentence Mr. Kelly credit for serving time that he was incarcerated and also time for – a credit for time that he spent in a halfway house. May I go through that with the Court?

**THE COURT:** I don't think it's going to do any good, Mr. Ervin. The Bureau of Prisons reserves the right to calculate good time, and I don't think my recommendation will make any difference.

**MR. ERVIN:** Well, I'm primarily addressing the issue, Your Honor, of giving credit for time spent in halfway houses on his sentence. In other words, he will get as a matter of law, as I understand it, credit for time that he's actually spent in jail, but the issue –

**THE COURT:** Or in custody, even if he were on bond, as I understand it. Isn't that – no, that wouldn't apply.

**MR. ISAACS:** He will – Your Honor, my understanding is that as long as he is in Federal custody on this particular charge, I believe they already calculate that. But I'm not sure – I believe he is – he is given credit for time served for all time he is in Federal custody for this particular charge. That is what I understand the law to be. Or – and that's the policy I believe the Bureau of Prisons –

**THE COURT:** And the Circuit Court has recently made it very clear that only the Executive Branch in the person of the [28] Bureau of Prisons can make that calculation.

**MR. ERVIN:** But I –

**THE COURT:** I – when I sentence I give credit for all that I'm legally entitled to give him credit for. They calculate whether he has served that sentence. If you'd like to make that on the record, state the dates. You're welcome to do so, so that that'll be part of the record.

**MR. ERVIN:** Yes, sir. I would like to do that.

**THE COURT:** All right.

**MR. ERVIN:** And I'd ask the Court to give the Defendant credit for eight days in the Harris County Jail from February the 8th until February the 15th, 1991.

**THE COURT:** That was while he was under arrest on these charges?

**MR. ERVIN:** That's correct, Your Honor.

**THE COURT:** All right. I'm sure he will get credit for that.

**MR. ERVIN:** Yes, sir. Also for seven days from February the 16th to February the 22nd, 1991, while he was in New Directions here.

**THE COURT:** Seven days?

**MR. ERVIN:** Yes, sir. There's – it goes on here.

**MR. ISAACS:** Your Honor, I'm not quite sure whether – I believe it's while he's incarcerated; and I

don't know if incarceration would include as a condition of release that he be at [29] a halfway house.

**THE COURT:** Well I could certainly be willing to add my recommendation for whatever it's worth as to any time he's spent in any of our jail facilities, but not for any time that he's spent in a halfway house.

**MR. ERVIN:** I understand, Your Honor.

**THE COURT:** All right.

**MR. ERVIN:** The – if I may very quickly, just –

**THE COURT:** Sure. Go ahead.

**MR. ERVIN:** Also –

**THE COURT:** Well, just tell me the dates for the record when he was in a halfway house.

**MR. ERVIN:** Yes, sir. Also I would ask for 180 days of home confinement from February the 23rd to August the 21st, 1991. Seventy-nine days from August the 22nd to November the 8th, 1991, in New Beginnings Treatment Center in Tucson, Arizona. One-hundred and five days from November the 8th to February the 21st, 1992, in New Directions, also here in Houston. And then 92 days – no, it's actually 151 days from May the 22nd, 1992, to July the 10th, 1992, spent in the Montgomery County Jail on this case.

**THE COURT:** All right. I will not make any recommendation to the Bureau of Prisons with regard to any of those dates. I'm going to let them make the calculations. So that's refused.

**MR. ERVIN:** Yes, sir.

**MR. ISAACS:** Your Honor, –

[30] **THE COURT:** Yes.

**MR. ISAACS:** I'm sorry. He's – this has to do with Mr. Witte. I just make sure that the record is complete that the Court has released Mr. Witte with –

**THE COURT:** On his bond.

**MR. ISAACS:** – on his bond; however, as the Court is aware, there must be a recommendation by the Government; and just to make sure that the Court is – we're clear on the record, the Government is not making such a recommendation. This is being done by the Court, and under 3143, so that the Court is aware, it says you have to refer back to A2, and under it, it says that the Judicial Officer may release him on bond if: one, the Judicial Officer finds a substantial likelihood that a Motion for Acquittal or New Trial will be granted, or in the disjunctive if the Attorney for the Government has recommended that no sentence of imprisonment will be imposed and the Judicial Officer finds by clear and convincing evidence that the person is not likely to flee, et cetera.

**THE COURT:** All right. Why don't you file a Motion to Revoke then, and I'll reconsider.

**MR. ISAACS:** Thank you, Your Honor.

**THE COURT:** All right. We'll stand in recess.

**(Adjourned 10:56 a.m.)**

(Service Omitted In Printing)

**UNITED STATES DISTRICT COURT**

SOUTHERN District of TEXAS

UNITED STATES OF AMERICA

V.

KURT STEVEN WITTIE

(Name of Defendant)

**JUDGMENT IN A CRIMINAL CASE**
**(For Offenses Committed On or After November 1, 1987)**

Case Number: H-91-00033-01

William Habern
Defendant's Attorney

THE DEFENDANT:

[X] pleaded guilty to count(s) 2 on February 21, 1992 .

[ ] was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s) |
|---|---|---|---|
| 21:841(a)(1), (b)(1)(B), 846 and 18:2 | Aiding and abetting in attempt to possess with intent to distribute marijuana. | 02-08-91 | 2 |

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

[X] Count(s) 1 (is) (~~are~~) dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $ 50 , for count(s) 2 , which shall be due [X] immediately [ ] as follows: CLERK, UNITED STATES DISTRICT COURT, ATTENTION: Finance, P.O. Box 61010, Houston, Texas 77208. IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. UNITED STATES ATTORNEY'S OFFICE, Financial Litigation Unit, P.O. Box 61129, Houston, Texas 77208.

Defendant's Soc. Sec. No.: 391-44-3641

Defendant's Date of Birth: October 29, 1952

Defendant's Mailing Address:

Rural Box 1367
Lyons, Colorado 80540

Defendant's Residence Address:

Rural Box 1367
Lyons, Colorado 80540

July 10, 1992
Date of Imposition of Sentence
/s/ Norman W. Black
Signature of Judicial Officer
NORMAN W. BLACK
UNITED STATES DISTRICT JUDGE
Name & Title of Judicial Officer
July 14, 1992
Date

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED FORTY-FOUR (144) MONTHS as to Count 2 .

[X] The court makes the following recommendations to the Bureau of Prisons: that the defendant be designated to a facility near his relatives in Colorado.

[ ] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States marshal for this district,

a.m.
[ ] at _____ p.m. on _____ .
[ ] as notified by the United States marshal.

[X] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

[ ] before 2 p.m. on _____.
[X] as notified by the United States marshal.
[ ] as notified by the probation office.

**RETURN**

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States

By _____
Deputy Marshal

**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS as to Count 2.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment

imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[X] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[X] The defendant shall not possess a firearm or destructive device.

The defendant shall participate in a program, inpatient or outpatient, for treatment of drug and/or alcohol addiction, dependency or abuse, which may include, but not be limited to urine, breath, saliva and skin testing to determine whether the defendant has reverted to the use of drugs and/or alcohol. Further, the defendant shall participate as instructed and as deemed necessary by the probation officer and shall comply with all rules and regulations of the treatment agency until discharged by the program director with the approval of the probation officer. The defendant shall further submit to such drug-detection techniques, in addition to those performed by the treatment agency, as directed by the probation officer.

## STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

## STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): the Court granted the

defendant a two-level reduction for acceptance of responsibility.

**Guideline Range Determined by the Court:**

Total Offense Level: 40

Criminal History Category: I

Imprisonment Range: 292 to 365 months

Supervised Release Range: 4 to 5 years

Fine Range: $25,000 to $2,000,000

[X] Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ _____

[ ] Full restitution is not ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

[X] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

APPROVED AS TO FORM: RMB

_____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | § | |
| | § | |
| | § | CRIMINAL NO. H-92-0207 |
| v. | § | |
| | § | |
| STEVEN KURT WITTIE | § | |
| TOM POKORNY | § | |

## INDICTMENT

THE GRAND JURY CHARGES THAT:

## COUNT ONE

On or about August 18, 1989 through August 15, 1990, in the Southern District of Texas, and elsewhere, and within the jurisdiction of this Court,

**STEVEN KURT WITTIE**
**TOM POKORNY**

defendants herein, and others known and unknown to the Grand Jury, did knowingly, intentionally and unlawfully agree, conspire and confederate to commit an offense defined in Title 21, United States Code, Section 952(a), that is, to import into the United States from a place outside the United States, in excess of five (5) kilograms of a substance containing a detectable amount of cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Sections 952(a); 960(b)(2)(B) and 963.

## COUNT TWO

On or about August 18, 1989 through August 15, 1990 in the Southern District of Texas and elsewhere, and within the jurisdiction of this Court,

**STEVEN KURT WITTIE**
**TOM POKORNY**

defendants herein, and others known and unknown to the Grand Jury, each aiding and abetting the other, did knowingly, intentionally and unlawfully attempt to import into the United States from a place outside the United States, in excess of five (5) kilograms of a substance containing a detectable amount of cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Sections 952(a); 960(b)(2)(B) and Title 18, United States Code, Section 2.

A TRUE BILL:

/s/ Illegible
FOREPERSON OF THE
GRAND JURY

RONALD G. WOODS
United States Attorney

By: /s/ Bertram A. Isaacs
BERTRAM A. ISAACS
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

(Caption Omitted In Printing)

(Filed Feb. 25, 1993)

PRETRIAL CONFERENCE
BEFORE THE HONORABLE KENNETH HOYT

* * *

[3] PROCEEDINGS

February 22, 1993

THE COURT: Good morning. This is cause number 92-207, the United States of America versus Kurt Wittie – Steven Kurt Wittie, I believe.

MR. ISAACS: It's Kurt Steven Wittie. "Wittie," your Honor.

THE COURT: I'm sorry. W-i-t-t-e or is it W-i-t-t-i, which is it?

MR. GERGER: It's W-i-t-t-e.

THE COURT: All right. And it's spelled differently on the presentence report, and I'll get it all right in a minute. So, I apologize.

Gentlemen, let me ask you, I believe we're here for a conference, but also to deal with the question of the double jeopardy plea, double jeopardy based on the plea of guilty that Mr. Witte entered apparently back in 1992, is it, or 1991, I'm sorry. He was sentenced, I believe, in '92

in Judge Black's court on an aiding and abetting pursuant to a plea agreement.

Let me ask, I don't believe you filed a written response, have you, Mr. Isaacs?

MR. ISAACS: Yes, your Honor, we did.

THE COURT: Have you?

MR. ISAACS: We filed a written response and –

[4] THE COURT: Well, let's see what I've got here.

I do have it. I'm sorry. I was looking at the transcript. The transcript as a part of I believe it may have been filed on motion hearing that was filed back in July of '91.

MR. ISAACS: That's correct, your Honor. There's also a transcript of a July 12th hearing which was a pretrial hearing in that other matter, which we gave a copy of that to the Court as well because it's referenced in the government's memo. We also gave a copy of that transcript to Mr. Gerger. The importance of that, it also goes mainly to the issue of whether or not these were separate and completely distinct crimes.

If I may, your Honor, could I – I could help perhaps by giving some history of how this case came about?

THE COURT: Go ahead.

MR. ISAACS: Basically, your Honor, sometime in 1990, Mr. Witte and another individual by the name of Tom Pokorny, who is also a defendant in this case, and a Dennis Mason were in contact with undercover agents

from the DEA concerning their intent to import into the United States controlled substances, specifically marijuana and cocaine. They had contact with these undercover agents. The undercover agents were posing as persons who could smuggle things across the border onboard their aircraft.

[5] They were hired by Mr. Witte, Mr. Pokorny and Mr. Mason. And, in fact, so – I want to say several hundred thousand dollars, but at least $100,000 or more in cash was tendered to the agents during the course of this conspiracy to get the controlled substance across the border. Mr. Witte participated in also the conversations and negotiations which we had captured on video tape. In fact, there are three video tapes that are involved here. There was also some property, a trailer, transport vehicles, which were supplied by the conspirators, a horse trailer specifically which was given by Mr. Witte for purposes of conspiring and importing this cocaine – I mean, marijuana into the United States.

They had not taken any substantial steps, but had, in fact, on a specific day told the agents where they were supposed to pick it up. Mr. Witte was going to be waiting on the United States side of the border when the agents brought it across. It was Dennis Mason who was going to be in Mexico. Tom Pokorny's whereabouts at that time were not known where he was supposed to be. The agents in cooperation with the Federales, the police in the Republic of Mexico, made contact with the conspirators on a landing strip in Mexico. They seized some close to 600 kilos of cocaine. They captured Dennis Mason, who is serving time now in Mexican prison on that offense. They did not know where Mr. Pokorny was,

and at that point in time they did not know where Mr. Witte was.

[6] Subsequently, I guess within a matter of days or a day or so, Mr. Witte made contact with the agents. He still didn't know that they were law enforcement officers, still didn't suspect that they were undercover agents. Mr. Witte was aware of the fact that Mr. Mason had been captured. Didn't know where Pokorny was, wanted to cool things off, and he went off on to places where he – unknown to the agents at that time. The officers didn't arrest him at that time because they wanted Mr. Pokorny as well.

Some months later in 19 – I believe it was 1991, in January, some several months later seven or eight months later, there was contact made between Mr. Witte and one of the subsequent undercover agents. The – this time Mr. Witte and it's not clear because of different versions of whether it was Mr. Witte that contacted the agents or the agents contacted Mr. Witte, but the result of it was is that Mr. Witte wanted to purchase marijuana from these undercover agents, and that he had another deal going that he wanted to purchase from them, and there's telephone conversations involving that. Now, this is the offense to which he pled guilty for.

The agents agreed with Mr. Witte. He transferred more funds, asked to use the trailer that he had used before, and supplied another trailer and this time he had a new co-conspirator, an individual by the name of – who we originally knew him as Sam Kelly. His real name is Ralph [7] Christopher Smith – Ralph Christopher – I can't

remember the last name. We didn't find that out until after the plea.

During some pretrial hearings, the government – that's what that July 12th hearing is all about. During the course of that, Mr. Witte's then counsel Chris Flood kept asking the government whether or not they were going to be using anything from any other conspiracy. We said this is the marijuana conspiracy which he was involved in in Judge Black's court is the only count that we're dealing with at this time.

They asked for discovery concerning what they believed to be the – because they were aware of – and they put it in kind of cryptic terms, was there some other offense that was involved. Mainly speaking to this cocaine conspiracy offense. They brought it up. The government did not.

The government emphatically unequivocally and with no equivocation at all stated that that cocaine conspiracy had nothing at all to do with the marijuana offense.

THE COURT: Wasn't it a part of the responsibility of this man when he was going through debriefing to tell everything that he knew, and isn't that how you learned it? I mean, he told you in the process – I'm not saying "you' – but he told you in the process of being debriefed to see if he could get his conspiracy count dropped so he could plead to the aiding and abetting, when it occurred?

MR. ISAACS: No. No, that was not true, your Honor. [8] He never ever admitted to any, to anything,

and if the Court would look at that January 12 hearing, he never, ever admitted.

THE COURT: Then why then, and here is my concern, why then and how did the probation office get this information unless they got it from him or from DEA, some of these same people who were investigating him simultaneously, let's say, for both of these offenses?

MR. ISAACS: I think, your Honor, if the Court would read that January 12 – July 12 transcript, you'll see that it was the defense counsel who kept bringing this issue up. It became an issue because of defense counsel. They kept talking about it during the pleadings. They kept, they went from varied things from it being discovery as part of the same conspiracy to going to the point where it was Brady evidence.

Judge Black denied them on all-counts basically stating that at that point in time, if you look at that July 12 hearing that this was not part of the same offense. And that the government could not, would not be using it because we stated we wouldn't be using it for any purposes. We never –

THE COURT: When did he enter his plea and when was he sentenced? He entered his plea, I thought – let's see.

MR. ISAACS: He entered his plea in 1991. I don't have a copy of the record with me, your Honor.

THE COURT: All right. I'm looking at the plea here. It seems to me that he entered his plea in March of '92. He [9] entered a plea of guilty to Count Two and to cooperate with the government by providing truthful

information concerning this and all other offenses about which he might be questioned by law enforcement agents as well as the grand jury if required. In exchange the government agreed to dismiss Count One, which is the marijuana, which is the conspiracy count and to file a 5 K 1.1 motion for downward departure at sentencing, if Kelly's cooperation resulted in substantial assistance. Did that happen?

MR. GERGER: Mr. Witte –

THE COURT: I'm sorry. Maybe I'm looking at the wrong – this is regarding Kelly, is that right?

MR. ISAACS: Yes.

THE COURT: Mr. Witte, let's see.

Witte appeared for sentencing on February 21st of '92, appeared for rearraignment and entered a plea of guilty to Count Two of the indictment, agreed to cooperate with the government, agreed to testify if required. 5 K 1 departure downward, if he cooperated, if cooperation is deemed as substantial. So, that's the same deal as Kelly got except you're saying that Kelly had a deal to give all the information about any offense that he had, and Witte didn't have that deal.

MR. ISAACS: Well, no, your Honor, I think the Court has confused the issues of his debriefing and testifying.

One of the things is that Mr. Kelly ends up [10] pleading guilty to that marijuana case because Mr. Witte pled guilty. That is primarily the reason why Mr. Witte got any consideration in the first place when we were going to move this case. But the fact that he debriefed,

none of that information is being used for purposes of prosecuting the case before this Court.

THE COURT: How do I know that?

MR. ISAACS: Your Honor, because it's stated in the record. All of the evidence, it is stated in the record with respect to the video tapes, which are going to be involved. We had a hearing on it. That was the July 12 hearing. We never had to turn them over.

Defense counsel has made a statement in his response to the government's response that Judge Black looked at those video tapes. He never saw the video tapes. No one has ever seen them until this case right now. They asked it to be turned over. We refused –

THE COURT: When were these video tapes made?

MR. ISAACS: These video tapes were made during the course of the cocaine importation conspiracy which is before this Court.

THE COURT: I know, but do you have any idea what those dates are?

MR. ISAACS: Yes, your Honor, they were in 1990, well before this marijuana conspiracy to possess with intent to [11] distribute marijuana ever came about.

THE COURT: Was this the case out of which the other co-conspirator, alleged co-conspirator, was convicted in Mexico, was that when the video tape was made?

MR. ISAACS: Mr. Mason, with respect to the importation case? Yes.

THE COURT: So, what you're saying in 1990, there was an operation going, video tapes were made, and those video tapes would show, I suppose, activity involving Witte and Mason –

MR. ISAACS: Unequivocally. They are like a Woody Allen film where he sits there telling us about what he wants to do. They are black and white and clear.

THE COURT: Well, here is my concern. Why would you – and not necessarily you – but why in the world would the government not want to go ahead and pick that man up and prosecute him in 1990, and wait and then get this little reverse sting operation marijuana charge in 1991, and then as a part of the sentencing include that as relevant conduct and punish him outside of the range of punishment that they could even punish him for on the marijuana charge?

MR. ISAACS: Your Honor, may I – there are two things that the Court is not aware of. Number one, one of the reasons being is that this was a very extensive investigation, and Mr. Pokorny was the person we wanted to have and we were still [12] investigating. The agents did not want to let anybody know who they were.

Secondly, with respect to what the Court concluded as the government wanting this evidence to be used for purposes of Mr. Witte's sentence, that is, the Court has not looked at the pretrial – the sentencing transcript. In that transcript both the government and the defense counsel argue to the Court that this was not part of the marijuana offense. Both the government and the –

THE COURT: But that's not what probation came up with. So, you end up with an offense level and a computation that's totally outside, and consideration has been taken. I think that what – what was the sentence that Mr. Witte received out of that trial?

MR. ISAACS: He got 144 months, your Honor.

THE COURT: Which is still in excess of what he would have received under the marijuana charge.

MR. ISAACS: No, your Honor.

THE COURT: That's a level – what, I mean, with a 5 K 1 departure, that's what brought to it the 144.

MR. ISAACS: Your Honor, under the guidelines the range of punishment for that marijuana case was 5 to 40, and as the Court is fully aware that the Court could depart anywhere it wanted to as long as it gave –

THE COURT: Mr. Isaacs, here is what I'm saying, if it [13] was 5 to 40, the question is what would the scoring have been under those circumstances? And in my opinion, the scoring on – well, let's just look it up. On the scoring on – what would have been the –

MR. GERGER: 371 pounds, and I believe it was about a five year sentence, but the government was recommending a downward departure from that. So, it would have been less than five years.

THE COURT: Well, but five years is 60 months.

MR. GERGER: Correct, 60 months, it would have been less than that.

THE COURT: He received 100 and what?

MR. ISAACS: Your Honor, let me see, if I understand. If the Court is arguing whether or not –

THE COURT: I'm trying to understand the facts.

MR. ISAACS: The fact is is that the government and defense counsel argued and objected to the presentence report stating that the use of that cocaine case as relevant conduct was objectionable, and we both did it on the record.

THE COURT: All right. Then what would the score have been for whatever – how many pounds of marijuana?

MR. ISAACS: It was a one thousand pound conspiracy. He pled to Count Two for the substantive count, and all the government had placed inside which we stipulated the fact we only put 375 pounds inside.

[14] THE COURT: What would that have been?

MR. ISAACS: It would have been –

THE COURT: What would that have made his score be at that point, on 375 pounds?

MR. ISAACS: Your Honor, on 375 pounds, I'll just look in my guidelines here. I believe it would be probably come out to a level 26, which would have been –

THE COURT: About 80 something months, probably. It would have been between 60 and 78 months, probably.

MR. ISAACS: Your Honor, as it's been stated here that it would have been a level 26.

THE COURT: Right, which is 63 to 78 months on a – if it's a criminal history category of one and 70 to 87 months or criminal history category two, which says to me that your downward departure should have been from that number if there was going to be a 5 K departure. It should not have been from some other number.

MR. ISAACS: Well, your Honor, I agree with you. That was what the government was complaining about at the time. We stated when we gave the 5 K, that the 5 K was only for this, that marijuana case. We stated that on the record.

THE COURT: I guess what I'm saying is, what I'm saying is it's not, it's not that – well, how can you downward depart from a sentence that the man shouldn't have received in the first place?

[15] MR. ISAACS: Well, your Honor, I'm not saying – I'm not – you're preaching to the choir here.

THE COURT: No, here is what I'm saying, if he was entitled to a 5 K departure, downward departure and when he received this benefit, he still got twice as much time as he would have gotten had he not had the deal that you made, you know, in terms of 5 K 1 departure –

MR. ISAACS: I understand.

THE COURT: – then the question is: Where in the world within the sentence is any authority for the judge to have given him an upward departure of twice the amount of time?

There's no way he could have done that unless he considered the relevant conduct which speaks volumes about how in the world we're sentencing these folk

with this relevant conduct showing. I mean, there's no way in the world that anybody could see this except in my opinion as seeing it as the judge looked at the scoring that was in the book based upon cocaine and other deals that were made and said, "Okay. This is a 40. What do you want to do?" And you said, "A 5 K 1 departure. Judge, I want you – he's cooperated. He's done all this stuff, and we want to tell you, Judge, that he is – we shouldn't consider the fact that he may have been doing a cocaine deal because we may even have an investigation going on in that regard." And the judge says, "Okay. That's fine. So, I'll downward depart ten points or two points," maybe he didn't [16] depart at all. 40 won't get you much more than what he got. 40 gets you 292 months. He got 180 something?

MR. ISAACS: 144.

THE COURT: 144, which means that he was sentenced at a level 32 which is an eight point reduction, essentially. I'm not sure that – see, I think that at least one of the things that the defendant says is right. He is suffering under a void or a voidable judgment.

MR. ISAACS: Your Honor, he could have appealed that, he didn't. He tried –

THE COURT: He doesn't have to appeal a void judgment. He can do it right now on some kind of writ or he can come in here and say, "Judge, I've already been sentenced to too much time. Don't sentence me to any more."

MR. ISAACS: Well, your Honor, I think that the guidelines speak to that issue already. 5 (g) 1.3 talks

about this very similar issue, but what the government loses is the ability to have these cases served consecutive. They must be served concurrently. Ordinarily, such an – if you look at 5 (g) 1.3, which is in the purple book before the Court, it speaks exactly to the type of issue we're dealing with here. We're dealing with a situation where a Court takes into consideration for purposes of punishment uncharged conduct, and then –

THE COURT: That's right. That's inappropriate.

[17] MR. ISAACS: Then 5 (g) 1.3 approves of it.

THE COURT: Well, it may approve it, but the point is that this man, the sentence that this man received is in violation of federal law. That's all it means. It's in violation of federal law.

MR. ISAACS: Your Honor, let me ask you this question –

THE COURT: I mean, we get reversed all the time for departing two or three points because we don't tell the Court why we're doing it, and there's no explanation for a man getting 144 months on a case when he would have received 65 or 70 months and would have received in my opinion probably 25 to 30 or 40 months on a 5 K 1 departure.

MR. ISAACS: Your Honor, the whole point – first of all, the whole premise, number one, of the 5 K was that it went to the issue of the marijuana case and solely that alone. There was never any discussion, in fact, emphatically, there was always a discussion that there was an ongoing investigation with respect to the cocaine, and there was never any part of the plea agreement that the

government would be dismissing or not charging Mr. Witte with that importation case. In fact, we –

THE COURT: I don't disagree that those probably are not the facts. That's not what I'm arguing about. I'm talking about the effect of what we're doing here. If he were found [18] guilty of these counts, I suppose, he'd get life. I don't know what he'd get. Probably somewhere in the range of two or 300 months, which says to me, that, you know, that it doesn't make sense to plea bargain with him on the marijuana to simply come around next week and charge him with a cocaine case.

MR. ISAACS: But he always was aware of that fact. That was always –

THE COURT: I'm not suggesting that he wasn't aware that that possibility didn't exist. I'm talking about the use of government money.

MR. ISAACS: Well, your Honor, let me also say this with respect to the issue of how much time he was going to get under this, under this guideline. 5 to 40 is the offense level. As this Court is aware that the Court regardless of any recommendations by the government or any opposition by the defense as long as it states on the record "may use uncharged conduct for purposes of going anywhere within that 5 to 40 range and may depart upward." He can appeal that issue. He never did. The issue was he could have appealed the upward departure, which is exactly what we're dealing with here. He never did it. He did not do it because he figured at this point in time that, hey, I don't know.

THE COURT: Maybe he figured on this day?

MR. ISAACS: Exactly.

THE COURT: On this very day.

[19] MR. ISAACS: And he cannot manipulate the system that way.

THE COURT: I think it's your function as a United States attorney to say, "Judge, you're wrong."

MR. ISAACS: We did.

THE COURT: "This is not where you ought to be. You ought to be at level 60," and you should have whispered in the Judge's ear –

MR. ISAACS: We said it on the record.

THE COURT: – "We've got another case out there."

MR. ISAACS: We did. I'm trying to say, your Honor, if you look at the record, we did. We told the Court that on several occasions, at sentencing, at pretrial hearings. We told him. We told the pretrial services people. We did it on all occasions. At sentencing we protested. It is very curious, if you look at the record, Judge Black –

THE COURT: I have read the record.

MR. ISAACS: Judge Black says on the record, he states – he addresses Mr. Witte, he says, "Mr. Witte, you know, you're in a very, very – do you know what's going on here? Your counsel and the government are objecting to this enhancement," and he says, "but for different reasons. The government wants to prosecute you on the other case. And defense counsel doesn't think

it's appropriate because he wants to get down to the lower." And the government, I mean, the [20] Court just completely ignored both counsel. Now, I'll show you –

THE COURT: But I cannot ignore this situation. I mean, just because Judge Black ignored it, doesn't mean I should ignore it. I have to do something about this because the problem is in my own heart, I know the man is being – has been done a bad deed by having him sentenced to something – by having some bargain that he never had with you. He had no deal with you at all the way he got sentenced. That didn't mean anything to him. He went in and bled his heart out, whether he told the truth or not. He went in and told you everything he knew. He's getting prosecuted for another offense, and he hasn't gained anything at all.

I guess you could say he gained the fact that Count One of the indictment was dismissed, but that wouldn't have made any difference under these circumstances. He should have just pled guilty.

MR. ISAACS: The government is precluded from acts, and the Court is precluded from imposing consecutive sentences. The Court cannot do that under the guidelines now.

THE COURT: I know, but if all you want is another 50 months or 60 months, why didn't you just get it out of him in the first place? Try him on that case. Let Judge Black give him 250 months, and we wouldn't be having two trials where that case took up a bunch of Judge Black's time and now I've got to [21] try the case. I mean, Judge Black got off clean. He just took a plea and it's an easy walk for him, but I'm going to have to try a

case that may take two or three weeks. I feel like I'm getting screwed in this process.

MR. ISAACS: Your Honor, we have two defendants. Regardless of what happens to Mr. Witte, I still have to prosecute Mr. Pokorny on this very same case.

THE COURT: I'm not suggesting you didn't, but I'm just talking about the efficiency and the use of your time, the use of government money, and the use of my time. That's the thing that bothers me, and the fact that the man is already serving 12 years, about 12 years already. I mean, what's – what can we give him, another ten?

MR. ISAACS: Your Honor –

THE COURT: How old are you, Mr. Witte?

THE DEFENDANT: 40, your Honor.

THE COURT: 40?

THE DEFENDANT: Yes, sir.

MR. ISAACS: Your Honor, had the government been aware that the Court was going to take this tack, there would have been – there would have been some consideration here with respect to the plea agreement. It was always understood by all parties concerned, defense, the Court and the government, that this case pending before this Court was not a part of that marijuana case. It is –

[22] THE COURT: I don't disagree that what you've done in terms of sentence – in terms of stating their offenses does not, and I don't know that counsel is

disagreeing with that, but they don't state clearly different separate offenses that which is one element, one aspect of jeopardy, a way that jeopardy attaches.

I'm not sure that he's not saying that you cannot prosecute him for conspiracy in a cocaine deal. I think more probably, and I think you may be making multiple arguments, but I think probably the strongest argument, if any, he has is a question of how much information did he give to you, if any, that resulted in this prosecution, number one; number two, what are the dates in terms of the time frames and how do you then carve out of that some special time that you want to prosecute him on another offense that is incorporated maybe to some extent or maybe not to the marijuana charge? He's already pled guilty. And then finally, whether or not the time that he's been sentenced to more than covers a period of time that he would have received had he pled guilty. Had he pled guilty to cocaine on that day, he wouldn't have gotten much more, if any, than what he's gotten now.

MR. ISAACS: Yes, he would have.

THE COURT: Aiding abetting cocaine and a 5 K 1 departure?

MR. ISAACS: He wouldn't have gotten a 5 K 1.1 [23] departure had we been dealing with this case.

THE COURT: That's what you're telling me today.

MR. ISAACS: Your Honor, we're in court right now. We could have at any point in time if that was the issue, if we had intended to do that, we could have done

that. That was never the issue. The issue and we emphatically stated at the time because the question was asked of us on the record where the scope of the 5 K –

THE COURT: Why didn't you just leave him alone and take the cocaine case and don't worry about the marijuana?

Why would the government knowing they've got a cocaine conviction be calling this man saying, "do you need 1,000 pounds of marijuana?" Except to make another entry on their books.

MR. GERGER: May I speak to that for just a second, your Honor? I want to speak –

MR. ISAACS: Let me – since Mr. Gerger –

MR. GERGER: I want to speak to a couple of points that have already gone by.

THE COURT: Let Mr. Gerger speak. I've been talking. You've been talking. Let's see if he has anything to say.

MR. GERGER: Judge, you know, you started off by asking how did Judge Black get to this point? As you said, if Mr. Witte would have pled to the cocaine, he would have been at a level 40. It doesn't matter if he would have pled to it or [24] not, the probation office considered it relevant conduct. Judge, we all know how the probation office writes its report. It talks to the agents and it says quote "Mason had an elicit drug organization," "Agent Norman, the DEA agent, would rather do both loads at once, the marijuana load and the cocaine

load." Quote "Pokorny, Mason and Witte aided and abetted to import to transport marijuana from Mexico and cocaine from Mexico and Guatemala."

It's the government that gave that information to probation. And, so, Mr. Isaacs says now there are two conspiracies, but they told the probation office there was one conspiracy. And Judge Black accepted that finding –

MR. ISAACS: Objection, your Honor, to that. That is emphatically untrue, and Mr. Gerger wasn't even there. That's not even part of the record.

THE COURT: These are his conclusions based on his reading of the PSI, and I understand that.

MR. GERGER: Judge Black accepted that finding. Made that finding, and the government says we should have appealed an upward departure. There was not an upward departure. Judge Black had a level of 40, and at the sentencing hearing, the government moved for a downward departure. Knowing that that was the level that Judge Black and the probation office had concluded, Judge Black departed downward, and we went on our way. The government did not appeal, and we have not pursued an [25] appeal.

I just want to make two brief points, your Honor. The tapes that Mr. Isaacs talks about discussed both marijuana and cocaine, and Mr. Isaacs says that Mr. Witte isn't harmed because he has to get a concurrent sentence. Well, the problem, Judge, is that Mr. Witte cooperated –

THE COURT: He may not be at a different level, but he'd have some relevant conduct to be considered.

MR. GERGER: Well, he wouldn't get his 5 K departure. He debriefed. He got a departure, and now they want to charge him for something that will carry the same offense level 288 months or whatever it is, and say, we're going to take away that downward departure, and that's what's so unfair.

THE COURT: Would the amount of cocaine that was being negotiated in this quote "conspiracy" put it at the same level?

MR. GERGER: We'd be at the exact same level because the total conduct would be the exact same conduct that was in the last presentence report.

THE COURT: How much cocaine was being negotiated?

MR. GERGER: I think 2,000 pounds.

MR. ISAACS: Well, no, that's not true, your Honor. There were supposed to be several loads that were going to be going through. The load that we took them down on was just the first –

THE COURT: I know, but you know what I begin to do in [26] this process? I begin to say, okay, you've got a conspiracy, now, how much cocaine did they get? Because the problem is that the very thing that's happening now could happen to someone later on. That is, in this process, that is that you – that a person enters a plea of guilty for conspiracy, and I had this in a heroine case involving some Nigerians. The guy enters a plea of guilty for conspiracy, and then we get into a tussle and an argument about whether or not the fact that he delivered 50 grams is the amount of stuff that I could find him in

possession of, because, "well, we talked about, Judge, we talked about two kilos of heroine and we talked about this, and we talked about that."

The point is that this conversation is a two-way conversation. The government is not standing on the sideline waiting on somebody to whisper some number in their ear. They go looking for this stuff. This is a part of the government's war on drugs. And so, the point is, that if you walked up to anybody who was selling anything and asked them for some amount of whatever it is they're selling, you're going to get a – you're going to generally get a positive response.

So, the question is as soon as you get through prosecuting him for that delivery of 50 grams on a Monday, then you can charge him with conspiracy the day following that because you had another conversation with him about the delivery of some more. And so, you've got this possession on [27] Monday, and you've got the conspiracy starting on Tuesday through Friday that you want to prosecute him for. This is the very kind of thing that I would be concerned about, and my statement to you is this: The question really is how much cocaine did they deliver? If they took them down with 200 pounds or 200 kilos, that's how much cocaine they were talking about as far as I'm concerned because I don't want to know what they talked about in terms of what their future negotiations may be.

MR. ISAACS: Your Honor, let me say this. If I understand the example you're giving, we're talking about the same course of conduct. We're talking about doing the same course of – same scheme.

THE COURT: We're using all these nice terms, Mr. Isaacs, to separate a deal. I mean, we can say, okay, "course of conduct" means from A to B, and after that, it becomes something else."

MR. ISAACS: But, your Honor, that's the whole premise of this. In the case at Bar here, we have a situation where Mr. Witte and his compadres were supplying in Mexico controlled substances to be imported into the United States. It wasn't the government asking –

THE COURT: But it wasn't violating our law.

MR. ISAACS: To import into the United States is a violation of our law.

[28] THE COURT: Once it comes over.

MR. ISAACS: It doesn't even have to come across the border, your Honor. All there has to be is an intent to conspire to bring it across the border and that they made substantial steps towards doing that, that was the violation. The second case was something completely different. This is when Mr. Witte comes to the government, and says, "Hey, listen. You got any marijuana to sell?" It was completely two different fact patterns.

THE COURT: I don't think that's what – that's not what the PSI says, and that's not what the motion says. It says the government after it laid off of him a period of time, called him up and talked to him about some marijuana.

MR. ISAACS: Well, your Honor, I think if you will look at the rearraignment, that's not the facts. The facts is stated in the rearraignment which is what Mr. Witte pled guilty to, the issue here is whether or not – I

think, in fact, if I recall, Mr. Witte objected to the government stating that it was he who called first, and he stated that the agents called first, but he did not deny the substance of what the offense was about.

THE COURT: No, and I don't think that anybody is denying that. But what I'm saying is, this is the government knowing that this man – they've got this man on video tape. They've got a movie of him doing this cocaine deal in Mexico or [29] some other place. And then they, then they say, well, let's cool off. Let's let this cool off. Then six months later, they say, "Hey, you want to do some marijuana? Everything is cooled off now."

MR. ISAACS: It wasn't cooled off, your Honor. There was an investigation trying to find Mr. Pokorny. Mr. Pokorny was a target that they had not gotten. He was the, as far as we were concerned, as far as the government was concerned, Mr. Pokorny was the one who was leading up this operation, and I can't go into – Mr. Pokorny is not here. But the fact is, is that –

THE COURT: Mr. Sherman is here. Are you here, Mr. Sherman?

MR. SHERMAN: I am very appreciative of what I'm listening to.

THE COURT: Of being acknowledged?

MR. SHERMAN: That's the real word.

MR. ISAACS: But the long and short of it is that the government wanted to get Mr. Pokorny. I mean, whether or not the Court approved of whether or not this was efficient or not efficient with respect to the way that the government was investigating their case, it was not

illegal. There was nothing unethical about it. It was the way they were trying to proceed upon investigating their case. It resulted in what the government wanted, which is we've captured Mr. Pokorny. He was [30] never aware of the fact that the government was looking for him as hard – didn't think he was ever going to be caught. The fact is we did finally catch him.

Nothing that Mr. Witte did ever helped us to catch him. Never did anything of the kind, and with respect to the only thing that he did with respect to that marijuana case, is he as a result of his plea, Mr. Kelly, his co-conspirator in that marijuana case pled guilty.

THE COURT: It helped the government a lot.

MR. ISAACS: And we got rid of that case. He got a 5 K for purposes of that marijuana case, and that's where we stand. I agree with –

THE COURT: I don't think he got a 5 K. I think we had some words said, but he never got a 5 K.

MR. ISAACS: Had there been no 5 K, then he would have gotten some 300. and some odd months in that case.

THE COURT: Had there not been this cocaine thing that was going on, this man would have gotten, would have probably gotten 60 months or less.

MR. ISAACS: He'd still be facing what he's facing today.

THE COURT: Well, no, he wouldn't have, because the point is the agents wouldn't have been so

aggressive to say, "Oh, yeah, we've got this cocaine thing we're doing out here, and we've got this business going."

[31] MR. ISAACS: Your Honor, I think we can get the probation officer up here.

THE COURT: I've got that report. We can read it.

MR. ISAACS: We can put the probation officer on the stand to state that it wasn't the government. In fact, the government called the probation officer and said, "Don't put that in." We asked them not to put that in. We said that that is not applicable. That is not relevant conduct under 1 (b) 1.3. We argued it in fact. We argued it –

THE COURT: Then why would the agents go in there and give him this information?

MR. ISAACS: Because, your Honor, the government –

THE COURT: They didn't pick it up off the street.

MR. ISAACS: The government is under a burden.

THE COURT: And that's why Probation put it in there, too. They have an obligation once it's revealed not to withhold that from me. That's the problem. See, you say you've got an obligation, a responsibility to tell, so does Probation. And so, now it's all, it's all subsumed, all of this information about his cocaine deal is subsumed in his marijuana deal. So, he ends up with a 40 point – he ends up on the Richter scale at 40 points rather than at 26.

MR. ISAACS: Your Honor, the thing is is that the Court has taken into consideration conduct which was not charged in the offense was not part of it. We have ample case [32] cases that –

THE COURT: For which he has been punished.

MR. ISAACS: Your Honor, we have cited cases in our brief where a man was charged with kidnaping in one jurisdiction and murder in another. He got life in one jurisdiction and then in the other jurisdiction for kidnaping, he got death because they used the murder as a basis for the felony murder charge. And that was two different separate jurisdictions. He got, and I would dare say that getting the death penalty for a case –

THE COURT: I suspect those offenses were committed in separate states, and that is the province of each state.

MR. ISAACS: But they were part of the same course of conduct.

THE COURT: Well –

MR. ISAACS: The man was kidnaped in one state and driven across the line to another state where he was murdered.

THE COURT: Right. And I've seen states where one guy gets the death penalty in Texas; take him to Louisiana, give him death there; take him to Florida, give him death there. I mean, as though this man's got six or eight lives.

MR. ISAACS: And the Supreme court said that the use of that already – that conviction for murder was

not double jeopardy to enhance or to assess the death penalty.

THE COURT: These are two different agencies dealing [33] out of the same poison well; but when the same agent deals out of the same poison well and deals two different series of poison, that's a totally different thing. That's what we're talking about.

MR. ISAACS: I'm confused with the Court using the terminology of "poison."

THE COURT: I mean, this man is serving time, that's poison.

MR. ISAACS: Does the Court mean that somehow, that it violates some constitutional provision or some legal provision?

THE COURT: That's what I think I've got to figure out, whether or not you as the government unit can dip into the well twice or the same well to get two different convictions not so much for conviction purposes, but for punishment purposes –

MR. ISAACS: Your Honor, as the Court is –

THE COURT: No, excuse me.

Because the point is that the offense level computation in my opinion at this point would not be significantly different than the one he's already received which is the one that is excessive and beyond what he would have received had the – had the officers or agents handled the investigation appropriately because he should never have been scored at that point.

MR. ISAACS: Your Honor, first of all, if this [34] gentlemen goes – the government would never stipulate to acceptance of responsibility on a case like this. We stipulated acceptance of responsibility for his marijuana case. It would be a different scoring pattern. He got acceptance of responsibility beyond the 5 K because he pled guilty to the marijuana case. Under this cocaine case, had he not –

THE COURT: We're talking about two or three points at most.

MR. ISAACS: It can be substantial at the range we're talking about.

THE COURT: We're not really talking about any points, because the scoring would begin at 40 or 42, and the acceptance of responsibility is to take away. That's what was taken away, three points, two or three points for acceptance of responsibility, and Judge Black was kind enough to give him five additional points. Six or eight points for a 5 K 1 departure, that's some kindness. Think about it. I mean, you know, here is a man that should have been sentenced at 60 months or less, and he gets 144 months.

MR. ISAACS: Your Honor, the bottom line is is that the law, first of all, tells the government how it can prosecute its cases. The guidelines, the government can do but so much and counsel can stand before the bench and argue and state that, hey, the presentence guideline is incorrectly calculated, and the defense counsel can argue that same thing [35] which they did in this particular case, and the Court says, hey –

THE COURT: Don't you think the government has a duty to appeal that void judgment just as much as the defendant? Because you know what you're dealing. You know what you want to do.

MR. ISAACS: But, your Honor, what burden do we have any more than the defense counsel?

THE COURT: To make sure that this issue didn't arise in this case, because I suspect that if these cases had been brought simultaneously, they would have all been brought in one lawsuit, and in one – you would have gotten a conviction on all these counts, and you would still have a man standing before you that you probably would have made a deal with on the marijuana so that he would have gotten less, he would have ended up with some kind of deal.

The point is that because these were not brought simultaneously, were not brought concurrently, they were – they're now before two different judges. We're looking at two different situations altogether.

MR. ISAACS: Your Honor, there was no way we could have brought these two cases together. We had two separate conspiracies. We had Mr. Witte and Mr. Kelly dealing with marijuana to possess with intent to distribute, and we had Mr. Witte, Mr. Dennis Mason and Mr. Pokorny dealing with agents to [36] import cocaine into the United States. Completely on two separate times, under the Blockberger Rule, under any rule they were two different deals. We would have had an objection under 404 (b), and anything else. If I had brought that marijuana case into this case, unless I had some basis

under 404 (b), we would have had reversible error all up and down. I couldn't do it. They are two –

THE COURT: Maybe on the marijuana, but you would have had him on something. You would have had nothing less than what you've got now.

MR. ISAACS: Your Honor, if there is anything that this Court is aware of that when I come into this courtroom, I go ahead and indict cases based upon the evidence that I have. Now, there is no way, and, in fact, I – there is no way that I could have used those two cases in the same indictment. There's just no way I could have done it.

THE COURT: I'm not sure based on what's in the PSI, and I don't know the facts. You see what I'm saying? I don't know, Mr. Isaacs. I'm saying that based on what is in the PSI, there is a suggestion that these cases could have been brought in a multiple count indictment against this man.

MR. ISAACS: But, your Honor –

THE COURT: I don't know that that's true or not.

MR. ISAACS: Your Honor, are we saying now that probation officers are going to stand in the place of the [37] United States Attorney's office and decide what type of cases we're going to prosecute?

THE COURT: No, I think that it's – if the DEA and these folks want to have five or six investigations involving somebody, they ought to keep their mouth shut and they should not go in there telling probation and these folk, "Now, we've got this other cocaine case we're

investigating these people on, and we want to tell you about it. But we don't want to tell you about it."

They don't have a duty to tell Probation anything.

MR. ISAACS: Your Honor, if you recall the scenario, the government never brought the issue up. Never at any time.

THE COURT: When you say "government," you're talking about a whole bunch of folk. Somebody brought it up.

MR. ISAACS: I am talking about my agents as well as my office.

THE COURT: Where did probation get this information?

MR. ISAACS: The issue was brought up, your Honor, if you look at the presentence report and especially at that July 12th hearing. You need to read that, your Honor. I respectfully request that the Court do that. It was defense counsel who came in and said, there is this other uncharged offense out here, and the government stood on this side and said, "Your Honor, we're not talking about any other uncharged [38] offenses. We're not bringing anything like that."

Defense counsel kept – then started laying out what it knew about. If you read that –

THE COURT: Probation wasn't there to hear that.

MR. ISAACS: Probation gets to see every single document that comes through here and gets to hear about it.

MR. GERGER: I don't think that was transcribed for the PSI, your Honor.

THE COURT: Probation wasn't there to hear that. Somebody had to give it to them; and, furthermore, all the agents didn't have to confirm it by giving them information, making statements.

MR. ISAACS: Once we are asked – I have already had situations, your Honor, where I have told the Court not – I don't want to turn over videos, and I have been required to turn over videos for PSI's. I had a case in which we had a situation, where it was absolutely, there was a guy who was charged with a cocaine offense, and it was some unrelated offense where he was beating up somebody, and it was a video about it. And I did not want to turn it over. Yet, I was required to do it.

THE COURT: Let me ask a question, other than the motion to dismiss, what remains to be done on this file before it's ready to go to trial? When are we scheduled for trial, Ms. Baird?

[39] THE CLERK: I believe it's scheduled for next week.

THE COURT: All right. In other words, if I – even if I were to grant your motion – Mr. Sherman, you're ready to go to trial next week, aren't you?

MR. SHERMAN: No, I'm not, Judge.

THE COURT: I'm sorry?

MR. SHERMAN: I'm not.

THE COURT: You're not ready?

How long does this case have to hang around here? This case has been on the docket now since 1992, September.

MR. SHERMAN: That may well be true, Judge. I am privy to, obviously, information that I would not otherwise have based upon the motion here if – and more importantly I've only been furnished with a copy of this video. I have not seen it. Mr. Gerger has it in his possession – the video.

MR. GERGER: I received those, and, Judge, I was always under the impression that Judge Black had seen those videos so we sent them to be copied, but we'll have those back today, and I can give a copy to Mr. Sherman.

MR. ISAACS: I will emphatically state on the record, Judge Black never saw any videos. He never saw one case report regarding this case. The only thing that came out of there was what ended up being in that PSI, and I reiterate, I submit that that is a result of defense counsel encouraging that issue to be put in the PSI.

[40] THE COURT: Well, I would have encouraged it, too, had the sentence been – well, apparently at that time, however, the sentence had not been determined. I guess that was back in '91 as opposed to '92 when the sentence was imposed.

So, what are you talking about, gentlemen, in terms of trial? What time do you need?

MR. SHERMAN: Judge, I don't see that my secretary caused a copy of my request for production of

documents to be filed with the Clerk's office. I don't know that it's in the file.

THE COURT: I don't have it. At least –

MR. SHERMAN: I have asked for certain information that I believe under the rules I'm entitled to, and the government has not responded.

THE COURT: Maybe they didn't receive it either?

MR. SHERMAN: Well, I notice here that this was January 28th. I don't show a green card that they received it. I understand it's two different locations, you go to the US Attorney's office Lyric Center or whether it comes here. I don't know that.

THE COURT: Okay. So, what I'm asking, what amount of time do you all need?

MR. SHERMAN: It's on – I didn't hear the date. You said it was March?

THE COURT: It's set next week, which is March 2nd or [41] 3rd.

MR. SHERMAN: Judge, I would be ready in your April term.

THE COURT: What is left to be disclosed, Mr. Isaacs?

MR. ISAACS: Your Honor, it is our usual practice, he can come down at any time. I will let him see. I will give him early Jencks with respect to any of the reports. I've shown them copies of the – of photographs we've blown up. They have been available as long as this

case has been on the docket. Mr. Gerger is aware. He's been able to come over to my office.

I think everybody has been sitting here worried about what's going to happen with respect to the Court's ruling on the issue we've been discussing this morning, but as my normal practice, any time they would like to come down to my office, I'll give them early Jencks. I'm not required to under the law, but I'll let them look at my DEA 6's, which I've always done in the past. They can look at all of the reports, and it's always been made available to them.

MR. SHERMAN: We've been sitting around waiting for disposition of this motion here. I think we had this matter set over the course of the Christmas Holidays and so forth.

THE COURT: We reset it for January 4.

MR. SHERMAN: That's right, and I have been in four trials since then.

[42] THE COURT: But these folks are in jail. We're not. Not yet, anyway.

MR. SHERMAN: I understand that, Judge. At least we don't rush into it as opposed to you get them out; if we can't, we're going to do the best we can.

THE COURT: Mr. – your client is not serving any time, is he?

MR. SHERMAN: Well, he is. He's serving time because he has a case out of northern California, I believe.

MR. ISAACS: He's due to be released.

THE COURT: He's due to be released?

MR. ISAACS: He's due to be released, your Honor. We have a hold on him for this trial, but he has, he was picked up on a parole violation, if I'm not mistaken in California. We then writted him here for purposes of this trial.

THE COURT: Well, let me say this. I'm really not of a mind to reset this case. If I'm going to try it, Mr. Sherman, I want to try it. I have –

MR. SHERMAN: I want to try it, too, Judge.

THE COURT: The problem I have on these criminal cases I've got too many of them, and I can't give them any of them to these other judges that don't have them. You see what happens? Judge Black gets a plea in one of these cases, and I'm going to end up trying the more serious offense. That's been my luck for the last five years.

[43] MR. SHERMAN: I understand that, Judge.

THE COURT: So, I have to try these cases, and they're not going away.

MR. ISAACS: Your Honor? Well, I'm sorry. I'd like to make a point about the sentencing.

THE COURT: We don't need to talk about sentencing right now.

MR. ISAACS: The issue, I think, with respect to the marijuana case, there's a transcript from that hearing and on page 18, I think the words of Judge Black were

interesting in which he says he's addressing Mr. Witte, and it's at the bottom. He says, "Do you know that both your lawyer and the government's lawyer are trying to convince me to disregard all of the talk about anything except this particular little marijuana deal? But for different reasons. Your lawyer wants me to disregard it so that I'll reduce your sentence in this case. The government's lawyer wants to disregard it so he can indict you in another case if he wants to."

It was clear at all times, your Honor, what this was about. There was never ever, and I assure you, your Honor, at any point in time had Mr. Witte made any objection to this, that perhaps Judge Black may have allowed him to withdraw his plea. He never asked for it.

THE COURT: Well, I'm not sure it would have made any difference since he'd already debriefed and told everything he [44] knew, and he'd already helped the government to make the deal. I mean, he was in a catch 22. The other man had already entered his plea of guilty.

MR. ISAACS: He never –

THE COURT: You got the benefit of the bargain.

MR. ISAACS: He never made any admissions concerning his complicity in that cocaine case.

THE COURT: But the point is that his entering his plea was enough to make Kelly step down and take a plea.

MR. ISAACS: For the marijuana case.

THE COURT: That's right.

MR. ISAACS: The much smaller marijuana case, and I agree with you. And that's why he got the 5 K, I agree. It had nothing at all to do with the case before this Court.

THE COURT: Well, I mean, you didn't have another case on Kelly, did you? What I'm saying, you got everything you had intended to get against Kelly, is what I'm saying?

MR. ISAACS: And Mr. Kelly wasn't the leader in that operation. Mr. Kelly was a minor – well, I shouldn't even call him a "minor player," but Mr. Kelly was a transporter. He was a truck driver.

Mr. Witte is the one that was transporting, given the money and all of the assets to be able to do this. In fact, on this second deal he comes up with another large sum of cash.

[45] THE COURT: Let me say this. Mr. Gerger has filed an awful lot of motions for continuance in my court and it probably is because he has a fairly good number of criminal cases to try. I don't intend to try to work around you all's schedule.

MR. GERGER: I just wanted to speak to that, your Honor. On March 1st –

THE COURT: I don't care what other judge's court you've got to go to trial in. I really don't. This case is probably as old if not older than some of the other judge's cases. If I were to take that date and move it to another date, I'm going to hear the same thing I've heard in the last three cases you've been involved in. "Judge,

I've got other things to do." You know, I don't know what I can do about that.

Gentlemen, I've got all my dates accounted for, and everything I've got is a week to two weeks. I think we're going to go to trial next week.

MR. GERGER: Judge, may I say something just for the record? On March 1st, I do start a trial with a detained client before Judge Rainey, and I understand your ruling, but I just wanted to state that on the record.

THE COURT: Well, did you tell Judge Rainey that you had a case set over here that was older than his case and had been reset?

[46] MR. GERGER: Well, your Honor, I did file a notice –

THE COURT: I just want to know whether or not you're being fair on the other side. Judge Rainey should know that you have been reset. You would have gone to trial in January, but the reason you didn't go is because you told me, I believe, in a motion that you had other cases pending. Probably one in Judge Rainey's court, maybe one in Judge Harmon's court. The case was reset.

Now, we're ready to go to trial, and there is another reason why you should be delayed. I just don't – I don't have a lot of sympathy.

MR. GERGER: The other thing, Judge, I wanted to mention is that if you deny our motion, I think –

THE COURT: Which motion?

MR. GERGER: The double jeopardy, the motion to dismiss. I think even the government recognizes that we have a right to appeal that unless it is a frivolous motion.

THE COURT: What, the motion denying it?

MR. GERGER: Yes, because it's a double jeopardy issue, and we cited the cases supporting that and I wanted to mention the government says we can't do that.

THE COURT: Well, if I agree with you that it's a double jeopardy issue, then I think you're entitled to relief; but if I disagree with you, the fact you may think it's jeopardy doesn't make it so.

[47] MR. GERGER: Well, Judge Black recently ruled in a case call Besborn, which you're familiar with the civil case, Universal Savings, that this is an issue that can be raised before trial. He granted our motion there, but I think the law is, Judge, that we can appeal your denial up to the Fifth Circuit unless our motion is –

THE COURT: You can do whatever you think is appropriate. I'm not suggesting you shouldn't, but – I mean, if I think it's a double jeopardy issue I'm certainly going to grant the relief, but I don't think you can just simply say that just because a man got a sentence in a case that he shouldn't have gotten that it automatically equals a double jeopardy.

MR. GERGER: Judge, I guess our view is a little different. We're saying he got the sentence he should have gotten because as you know, Judge, the government can charge you with stealing a cookie, but at sentencing, you get sentenced for stealing the whole store. That's the

way relevant conduct works, and then they can't come back and charge you for stealing the cookie jar, because it's already been factored in to the sentence.

THE COURT: They're saying not stealing the cookie jar, they want to charge him with conspiracy to steel [sic] the cookie jar.

MR. GERGER: Well, but they agreed in their last plea [48] to dismiss the conspiracy to steel the store. And, Judge, I guess, the last point is –

THE COURT: But you haven't pled guilty though so apparently there's no deal.

MR. GERGER: I beg your pardon?

THE COURT: Oh, I see what you mean. The conspiracy equating that to the marijuana.

MR. GERGER: Exactly.

THE COURT: I see.

MR. GERGER: So, Judge, we would ask you to stay at least Mr. Witte's trial under the case law that we've cited.

THE COURT: I'm not going to stay anything. The Fifth Circuit can stay whatever they want to stay.

MR. ISAACS: Your Honor, under two grounds. Number one, how can you –

THE COURT: I don't want to talk about this any more.

MR. ISAACS: But the other portion with respect to this particular statement. The issue isn't even

ripe here yet. He's pleading under the punishment issue of the double jeopardy clause. We haven't even gotten to the conviction on this case. And until there is a conviction, the issue of whether he's – if he's being punished twice for the same thing, doesn't even become a ripe issue. It's something that you – you know, we're talking about something that hasn't occurred yet, or cannot even occur until there is a conviction.

[49] So, I mean, the motion that we're hearing here right now, I believe that the government has already stated we believe it's premature in the first place. And so, there is no – I mean, until there is a conviction, the issue of whether or not he's being punished for the same crime, really does not come into being.

THE COURT: All right.

MR. GERGER: Judge, one last point. This is David Gerger for the record again. You asked if there are other motions that would need attention –

THE COURT: I don't have any motions in the file.

MR. GERGER: I just wanted to alert you. The only thing I can foresee is we would like to investigate whether Mr. Witte debriefed under a proffer letter, and –

THE COURT: I don't know how you're going to do it. Let me tell you. This case has been pending since September. It's not – it's not unusual for me to try these cases within a reasonable period of time, within three to four months. And I have a reason for doing that because I seem to never be able to get ahead of the curve on these

criminal cases. I have more than my share of criminal trials.

I spend generally twice as much time in court on these criminal cases than any other judges in this district, which says to me, that my cases are either being tried because people don't like me or because they think they're going to get [50] a better fair trial than they do with these other judges or because the deals aren't being made in my court. For whatever reason, I cannot slack up. I cannot let these cases back up on me, and I have to spend all of the summer working through these cases working through everybody's schedule of vacations and calendars and wrestling with lawyers trying to figure out how to get these cases tried. That's what I'm relegated to do simply because the parties are not entering pleas of guilty and because I am getting an – not – I'm getting a more than my share of these cases, and I have more criminal cases than these other judges, okay? So, I really don't care what these other judges are doing.

I do want to try these cases, and I want to get them over with so I don't have to look at this case as well as the other five that I've got scheduled, four that I've got scheduled for trial in March. I've got a full calendar, and I've got plenty to do.

MR. SHERMAN: Judge, may I? For the record, John Sherman.

I notice here, Judge, that I am scheduled for docket call and jury selection in the Eastern District on the 1st, and assuming that I'm caught up in Judge Cobb's and Judge Fisher's court over there, I mean, I'll be there until released.

THE COURT: I don't think there's a thing I can do [51] about it.

MR. SHERMAN: I understand that, I just want for the record to indicate, your Honor, what my situation is. And of course, this is nothing new to you because I've had this situation before.

THE COURT: Every week.

MR. SHERMAN: I hit the highway to get here.

THE COURT: Well, you know the way to Beaumont, don't you?

MR. SHERMAN: Many times.

THE COURT: I think the last time you just put it on cruise control and closed your eyes.

MR. SHERMAN: I did.

THE COURT: All right. Gentlemen, we'll see you Tuesday.

MR. SHERMAN: Very well.

(The proceedings were concluded in this matter.)

(Certificate Omitted In Printing)

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | § | |
| | § | |
| VS. | § | CIVIL ACTION NO. H-92-207 |
| | § | |
| KURT STEVEN WITTE, | § | |
| | § | |
| Defendant. | § | |

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**ORDER DISMISSING INDICTMENT AS TO KURT STEVEN WITTE**

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Pending before the Court is the defendant's Kurt Steven Witte, motion to dismiss because of double jeopardy and because of his claim that the government, in bringing these charges, breached its plea agreement with him. After reviewing the defendant's motion and the attachments and the government's response to the motion, the Court determines that the motion should be granted.

On March 4, 1991, a two-count indictment was filed in this District against the defendant in cause number H-91-33 charging him with conspiracy to process with intent to distribute marijuana and with aiding and abetting in the attempt to possess with intent to distribute marijuana, in violation of Title 21 U.S.C. §§841(a)(1), (b)(1)(B) and 846 and Title 18 U.S.C. §2. Subsequently, the defendant entered a plea of guilty to Count 2, the aiding

and abetting charge, pursuant to a plea agreement. That agreement provided that, in exchange for his plea of guilty and agreement to cooperate with the government in the marijuana case, the government would dismiss Count 1 of the indictment (*the conspiracy count*) and if it deemed the defendant's cooperation substantial a U.S.S.G. §5K1.1 motion for a downward departure in sentence would be filed.

As agreed, the co-defendant pled guilty and the government filed a §5K1.1 motion for a downward departure in sentencing. The defendant was sentenced on or about July 10, 1992. At that time a Presentence Report had been completed and filed and the sentencing judge sentenced the defendant to 144 months confinement in federal prison. In settling on this sentence, the sentencing court adopted the factual statements contained in the Report, particularly those in the "offense conduct" section.

The court arrived at an offense level of 40 by determining that the defendant had discussed and, therefore, intended to deliver 15 tons of marijuana from Mexico, 500 kilograms of cocaine from Guatemala, 591 kilograms of cocaine from Mexico, and was involved in a marijuana reverse buy, involving 1,000 pounds of marijuana in Houston, Texas. The probation officer, pursuant to U.S.S.G. §2D1.4, converted the 1091 kilograms of cocaine into the equivalent kilograms of marijuana. (232,261.6 kilograms).

Having established the marijuana equivalency, the probation officer concluded that the offense level of 40 was appropriate because the amount of marijuana involved was at least 100,000 kilograms but less than

300,000 kilograms. The probation officer determined that the defendant played an aggravating role and, pursuant to U.S.S.G. §3B1.1(c), increased the defendant's offense level by two (2) resulting in an adjusted offense level of 42. This offense level permitted the court to sentence the defendant between 360 months and life confinement.

When the defendant appeared for sentencing, the court, in accordance with the government's motion for a departure pursuant to U.S.S.G. §5K1.1 sentencing, sentenced the defendant to 144 months confinement, essentially sentencing the defendant at offense levels 32 or 33. *(Levels 32 and 33 together permit sentencing between 121 and 168 months).*

On September 2, 1992, the government caused a second indictment to be returned against the defendant wherein the defendant is charged with conspiracy to import cocaine into the United States (Count 1) and aiding and abetting the attempt to import cocaine into the United States (Count 2). It is this indictment that is the subject of this motion.

**Contentions:**

The government contends that the charges of conspiracy to import cocaine and aiding and abetting charged in this case are separate and distinct offenses from the conspiracy and aiding and abetting the possession with intent to distribute marijuana charges filed in cause number H-91-33. The government points out that the evidence concerning the cocaine offenses occurred between August 18, 1989, and August 15, 1990, some

seven (7) months prior to the marijuana offenses. Therefore, double jeopardy does not apply.

The government also contends that, because the sentence on the marijuana conviction must be served concurrently with any sentence on a cocaine conviction, the defendant suffers no harm.

The defendant contends that jeopardy attached when the defendant was sentenced based upon consideration of offense conduct that occurred in 1989 and 1990. The defendant contends that, because his punishment, including the §5K1.1 downward departure, exceeded the maximum punishment that the defendant could have been sentenced to had he been sentenced only on the marijuana offense, the plea agreement is breached by this current indictment.

**Discussion:**

The two components of the double jeopardy principle provide protection against a subsequent prosecution for the same offense and against multiple punishments. *See Grady v. Corbin*, 495 U.S. 588 (1990); *see also United States v. Koonce*, 945 F.2d 1145 (10th Cir. 1991).

In the case at bar, the Court focuses only on the second prong of the double jeopardy protection. In this vein, *Ball v. United States*, 470 U.S. 856 (1985), is instructive. In *Ball*, the Court held that the Congress, in enacting the Sentencing Guidelines, did not intend to punish the same offense under two separate statutes: (the sentencing guidelines vs. the criminal statutes). The guidelines support this observation. Under §3D1.1(a), the "Procedure

for determining Offense Level on Multiple Counts", the guidelines provide that:

> "[W]hen a defendant has been convicted of more than one count, the court shall:
>
> (1) Group the Counts resulting in conviction into distinct Groups of Closely-Related Counts ('Groups') by applying the rules specified in §3D1.2.

Section 3D1.2 speaks to the circumstance where the same victim is involved in two or more acts or transactions by a common criminal objective or constituting part of a common scheme or plan. The fact that offenses occur at different times or that offenses may involve different types of drug activity is of no moment. (*See* Commentary U.S.S.G. §3D1.2). Moreover, even if the criminal objective or scheme constitutes or is composed of legally distinct offenses occurring at different times, the teachings of *Ball* still apply.

The circuit court in *Koonce* expressed the same view. 945 F.2d 1145. Koonce was charged with one count of distributing an unspecified amount of methamphetamine. When the trial court calculated the sentence, it considered the methamphetamine seized at the defendant's residence as well as a quantity sold to a co-defendant. The Court sentenced Koonce after considering all of the methamphetamine identified.

Later, the government decided to prosecute Koonce on the methamphetamine seized at the defendant's home. There as here, the government argued separate and distinct crimes, and no harm in the concurrent sentencing

scheme. In rejecting the arguments, the circuit court concluded that the trial court had aggregated Koonce's related crimes and conduct, prior and subsequent, in computing the base offense level and had sentenced him accordingly. Thus, the circuit court concluded that a subsequent punishment would violate the double jeopardy clause of the federal Constitution.

That reasoning and conclusion apply in the case at bar. The government cannot be permitted to craft or develop a scheme by which a person may be twice punished. See *Koonce*, 945 F.2d 1145. This limitation is for a good reason. The government, with its awesome power, gets to choose the crime(s) for which a citizen may be prosecuted. For example, in this case, the marijuana charge resulted from a marijuana reverse buy. Readily, one can see that the government could orchestrate any number of individual drug transactions over a period of months or years and charge each transaction as a separate violation. Certainly, the government should be permitted to decide from which well it draws the poison, but it cannot then declare successive draws as constituting different poisons.

The findings of the sentencing judge in the marijuana conviction show that drug dealings between the defendant and the undercover agents was "reactivated" in June 1990. At that time, the undercover agents wanted both marijuana and cocaine imported into the United States. When a shipment of cocaine was seized in August of 1990, all contact between the undercover agents and the defendant ceased. The activity resumed in January 1991, when an undercover agent contacted the defendant. This

contact resulted in the defendant's conviction on the marijuana charge. The sentencing court found that the June and July 1990, meetings were significant and permitted the establishment of the "infrastructure" of the subsequent marijuana conviction. Armed with this evidence, it is no wonder that the sentencing court saw the activity in January of 1991 and June 1990 as a series of transactions constituting one common scheme or plan.

It is this Court's opinion that the prosecution of the defendant on the cocaine conspiracy and substantive count constitutes a violation of the Double Jeopardy Clause of the United States Constitution because it seeks to punish a second time conduct already punished.

The effect of permitting such carving also defeats the spirit and intent of the plea bargaining process. While the government may give a benefit during the plea bargaining process, only the courts are permitted to take it away.

It is ORDERED that the defendant's Kurt Steven Witte, motion to dismiss is hereby GRANTED.

Signed this 24th day of February, 1993.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
UNITED STATES DISTRICT JUDGE

United States Court of Appeals,
Fifth Circuit.

**UNITED STATES of America,**
**Plaintiff-Appellant,**

**v.**

**Steven Kurt WITTIE, Defendant-Appellee.**

**No. 93-2245.**

June 23, 1994.

Appeal from the United States District Court for the Southern District of Texas.

Before HIGGINBOTHAM and WIENER, Circuit Judges; KAUFMAN,* District Judge.

WIENER, Circuit Judge:

Plaintiff-Appellant the United States (the government) appeals the district court's dismissal of its two-count indictment that charged Defendant-Appellee Steven Kurt Witte[1] with conspiracy and attempt to import 1,091 kilograms of cocaine into the United States. The district court dismissed the indictment on grounds that punishment for the indicted offense would violate the multiple punishments prong of the Double Jeopardy clause of the Fifth Amendment through inclusion of the indicted offense in relevant conduct at sentencing for a related offense to determine Witte's base offense level. We disagree with the district court's conclusion that Witte

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* District Judge of the District of Maryland, sitting by designation.

[1] Witte, not Wittie, is the correct spelling.

would be subjected to impermissible multiple punishments for the same offense and therefore reverse and remand.

## I
## FACTS AND PROCEEDINGS

In August 1989, undercover DEA Agent Roger Norman negotiated with Dennis Mason in Tucson, Arizona to transport marijuana from Mexico into the United States. The negotiations were unsuccessful, but discussions between Norman and Mason resumed in Houston in June 1990. At that time, Witte, Mason, and Tom Pokorny planned to import marijuana from Mexico and cocaine from Guatemala. Both the Mexico deal and the Guatemala deal were going on simultaneously. Norman's job would be to fly the contraband into the United States.

In July 1990, the Mexican marijuana source advised that cocaine might be added to the shipment if there were room on the plane or if marijuana were not available. The following month, Norman was told that the Mexicans were ready with 4,400 pounds of marijuana. Once Norman learned the coordinates of the airstrip, arrangements were made to have the participants arrested in Mexico. On August 12, 1990, Mason and four others were apprehended. Instead of marijuana, 591 kilograms of cocaine were seized. The following day, while still undercover, Norman met Witte to explain that the pilots had been unable to land in Mexico because police had shown up at the airstrip.

Witte, Mason, and Pokorny were not charged with conspiracy and attempt to import cocaine at the time

because Mason was incarcerated in Mexico and Pokorny's whereabouts were under investigation. All contact between Witte and Norman ceased until January 1991.

Norman next contacted Witte in January 1991 and asked Witte if he were interested in purchasing 1000 pounds of marijuana from Norman. Witte answered affirmatively, and said that he would call Norman to tell him whether he could raise the $50,000 downpayment. Witte telephoned three days later from Denver, Colorado stating that he had the downpayment. Witte asked Norman – who still had possession of Witte's horse trailer from the prior activities – to return the trailer so that it could be used as a load vehicle for the marijuana. Witte stated that he would bring from Denver a motor home owned by Sam Kelly to use as a second load vehicle.

On February 7, 1991, Witte met Norman in Houston and informed him that he could only come up with half of the downpayment. Norman agreed to give Witte 1000 pounds of marijuana for $25,000 in downpayment and to allow Witte three days to obtain the balance. Witte introduced Norman to Kelly and showed Kelly's motor home and its various hidden compartments to Norman. Fellow undercover officers took the motor home and trailer to load the marijuana, at which time Witte and Kelly took Norman to Witte's hotel room to view the money. The two vehicles arrived loaded with approximately 375 pounds of marijuana.[2] Witte and Kelly took possession and were promptly arrested.

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[2] The vehicles were actually loaded with approximately 1,000 pounds of marijuana, but the government stipulated to a lesser quantity.

The government indicted Witte for (1) conspiring to possess with intent to distribute more than 100 kilograms of marijuana[3] and (2) aiding and abetting possession with intent to distribute marijuana (collectively, the marijuana offense).[4] The charges resulted from the January-February 1991 "reverse-buy" of marijuana. Facing a statutory range of 5-40 years,[5] Witte entered a Rule 11(e)(1)(B) plea agreement with the government.

Witte pleaded guilty to the substantive count of aiding and abetting possession with intent to distribute marijuana and agreed to cooperate with the government by providing truthful and complete information concerning the charged offense as well as any others about which he might be questioned. The government agreed to dismiss count one of the indictment – conspiracy to possess with intent to distribute in excess of 100 kilos of marijuana from January 25, 1991 through February 8, 1991 – and to file a § 5K1.1 motion if Witte's cooperation amounted to substantial assistance. Although not expressed in the recitation of terms of the agreement, the government states that Witte was also promised a recommendation to a three-year cap if he brought in Pokorny, who was involved in the cocaine offense. Although Witte did not assist the government in locating Pokorny, Witte's cooperation did cause his co-defendant in the marijuana offense, Sam Kelly, to plead guilty.

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[3] 21 U.S.C. § 841(a)(1), (b)(1)(B); 21 U.S.C. § 846.

[4] 21 U.S.C. § 841(a)(1), (b)(1)(B); 18 U.S.C. § 2.

[5] 21 U.S.C. § 841(b)(1)(B).

At sentencing, the district court found that the marijuana and cocaine offenses were part of the "same course of conduct." Over objections by both Witte and the government, the court included the cocaine in relevant conduct to determine Witte's base offense level.[6] The government urged the court to accept the parties' position that the cocaine deal was not relevant to the marijuana deal. The government argued against inclusion of the cocaine because it planned to indict Witte later for the cocaine offense. If the cocaine were not included in relevant conduct, the government could seek consecutive sentences for the cocaine and marijuana offenses. On the other hand, Witte objected to inclusion of the cocaine because he hoped for a shorter sentence: if only the 375 pounds of marijuana were considered, the Guideline range would be 63 to 78 months rather than 292 to 365 months.

Witte's base offense level was pegged at 40, with a Guideline range of 292 to 365 months. From that base offense level, Witte received a 2-level increase for his aggravating role in the offense and an offsetting 2-level decrease for acceptance of responsibility The court granted the government's § 5K1.1 motion for downward departure based on Witte's substantial assistance. By virtue of that departure, Witte was sentenced to 144 months – 148 months below the minimum sentence of 292 months

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[6] It is not clear whether the court determined the quantity of drugs involved in the cocaine offense to be 591 kilos (the amount seized) or 1,091 kilos (the amount seized plus an additional 500 kilos discussed). But inclusion of either quantity in relevant conduct results in a Guideline range of 40 (500-1500 kilos of cocaine).

under the pre-departure Guideline range. Witte appealed, but the appeal was dismissed due to Witte's failure to file a brief.

The government then indicted Witte and co-defendant Pokorny on two additional counts: (1) conspiring to import cocaine[7] and (2) aiding and abetting in the attempt to import cocaine[8] (collectively, the cocaine offense).[9] The indictment alleges that, between August 1989 and August 1990, Witte tried to import about 1,091 kilograms of cocaine from Central America. Witte moved to dismiss, arguing that he had already been punished for the cocaine offense because the cocaine was included in relevant conduct at sentencing for the marijuana offense. Witte also argued that the indictment breached the plea agreement.

The district court dismissed the indictment on grounds that punishment for the indicted offense would violate the multiple punishments prong of the Double Jeopardy Clause of the Fifth Amendment because the indicted offense had been included in relevant conduct at sentencing for the marijuana offense to determine Witte's base offense level. The court's conclusion on the breach of the plea agreement issue is not so clear, but it does not appear that the indictment was dismissed on that basis.[10]

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[7] 21 U.S.C. §§ 952(a), 960(b)(2)(B), 963.

[8] 21 U.S.C. §§ 952(a), 960(b)(2)(B) and 18 U.S.C. § 2.

[9] Although the "cocaine offense" involved the importation of cocaine and marijuana, it is referred to as the cocaine offense to distinguish it from the 1991 activities involving marijuana – the "marijuana offense."

[10] The court stated that "[t]he effect of permitting such carving also defeats the spirit and intent of the plea bargaining

The government timely appealed the dismissal of the indictment.

## II
## ANALYSIS

### A *Double Jeopardy*

#### 1. Standard of Review

We review de novo the dismissal of the cocaine indictment on grounds of double jeopardy.[11]

#### 2. Multiple Punishments Prohibited?

The Double Jeopardy Clause provides that no one shall "be subject for the same offense to be twice put in jeopardy of life or limb."[12] The Supreme Court has left no doubt that the clause protects defendants from both multiple prosecutions and multiple punishments for the "same offense."[13] Witte argues that the government's present attempt to punish him for the cocaine offense violates double jeopardy's multiple punishments prong: he

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process. While the government may give a benefit during the plea bargaining process, only the courts are permitted to take it away." The minute entry reads, "[T]he motion to dismiss on the basis of double jeopardy is granted."

[11] *United States v. Vasquez-Rodriguez*, 978 F.2d 867, 870 (5th Cir.1992); *Baker v. Metcalfe*, 633 F.2d 1198, 1201 (5th Cir.), *cert. denied*, 451 U.S. 974, 101 S.Ct. 2055, 68 L.Ed.2d 354 (1981).

[12] U.S. CONST. amend. V.

[13] *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076-77, 23 L.Ed.2d 656 (1969).

has already been "punished" for the cocaine offense charged in the subject indictment.

At the outset, we note the importance of distinguishing double jeopardy's prohibition of multiple prosecutions from its protection against impermissible multiple punishments. Although multiple prosecutions, i.e., more than one *prosecution* by the same sovereign for the same offense, always violate double jeopardy,[14] multiple *punishments* for the same offense *may* or *may not* violate double jeopardy. That is because Congress (or a state legislature) determines the scope of the constitutional protection in the multiple punishments context. If the legislature intended to impose multiple punishments for the same offense, imposition of such sentences does not violated the Constitution.[15] The purpose of the Double Jeopardy Clause in the multiple punishments context is to ensure that the punishment assessed does not exceed that authorized by the legislature (either the length of the sentence or the number of times that the sentence is imposed).[16]

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[14] We emphasize that the indictment or the prosecution does not run afoul of the prohibition against multiple prosecutions. Witte is not subject to multiple prosecutions for the cocaine offense – he was never placed in jeopardy for that offense. Our concern is with the punishment that would result if Witte were to be prosecuted for the cocaine offense: he is potentially subject to multiple punishments for the cocaine offense.

[15] *Missouri v. Hunter*, 459 U.S. 359, 367, 103 S.Ct. 673, 678-79, 74 L.Ed.2d 535 (1983) (quoting *Albernaz v. United States*, 450 U.S. 333, 344, 101 S.Ct. 1137, 1145, 67 L.Ed.2d 275 (1981)).

[16] *Jones v. Thomas*, 491 U.S. 376, 281, 109 S.Ct. 2522, 2525-26, 105 L.Ed.2d 322 (1989); *Garrett v. United States*, 471 U.S. 773, 778, 105 S.Ct. 2407, 2411, 85 L.Ed.2d 764 (1985); *Missouri v. Hunter*,

For purposes of double jeopardy, the drugs involved in the "same offense" – conspiring and attempting to import cocaine – were included in relevant conduct to sentence Witte for the marijuana offense and are the subject of the dismissed indictment.[17] The pertinent issues are (1) whether inclusion of the cocaine in relevant conduct at sentencing for the marijuana offense punished Witte for the cocaine offense, and if so, (2) whether Congress has authorized single or multiple punishment for the cocaine offense. This double jeopardy issue is *res nova* in this circuit, but the Second and Tenth Circuits have considered it.[18] Both have concluded that a defendant's

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459 U.S. 359, 266-68, 103 S.Ct. 673, 678-79, 74 L.Ed.2d 535 (1983); *Pearce*, 395 U.S. at 711, 89 S.Ct. at 2072; *United States v. Martinez*, 931 F.2d 851, 853 (11th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 268, 116 L.Ed.2d 221 (1991).

[17] Thus both parties assume that the "same offense" element is satisfied under the test enunciated in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). But clearly the statute under which Witte was convicted and the statutes under which he is now indicted proscribe different offenses, i.e., aiding and abetting possession of a controlled substance (21 U.S.C. § 841(a)(1); 18 U.S.C. § 2), and conspiring to import, and aiding and abetting in the attempt to import, a controlled substance. (21 U.S.C. §§ 952(a), 963; 18 U.S.C. § 2) *Cf. Hunter*, 459 U.S. at 367, 103 S.Ct. at 678-79; *United States v. Cruce*, 21 F.3d 70, 75-76 (5th Cir.1994). We address the issues in this case, however, as they were presented by the parties.

[18] Since this appeal was argued and taken under submission, another panel of this court has addressed the same issue that is now before us and has concluded, as we do, that double jeopardy does not preclude the subsequent prosecution and conviction of conduct that was earlier included in relevant conduct. *See Cruce*, 21 F.3d 70.

acts included as relevant conduct in calculating punishment for one offense may not later form the basis of another indictment without violating double jeopardy.[19]

In *United States v. Koonce*,[20] the defendant was convicted of distributing 443 grams of methamphetamine that he had mailed to his cohort. The district court sentenced him, however, for 7,869 grams. That quantity included 443 grams proved at trial, 963 grams found in his home, and 6,463 grams that Koonce was purported to have sold on other occasions. Inclusion of the additional grams in "relevant conduct" increased Koonce's offense level under the Guidelines from 32 (range: 188 to 235 months) to 34 (range: 235-293 months). Unlike Witte, Koonce received the maximum statutory sentence for all of the drugs (240 months).[21]

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[19] *United States v. Koonce*, 945 F.2d 1145 (10th Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1695, 118 L.Ed.2d 406 and ___ U.S. ___, 112 S.Ct. 1705, 118 L.Ed.2d 413 (1992); *United States v. McCormick*, 992 F.2d 437 (2d Cir.1993).

[20] *Id. Koonce* was relied on by the district court in dismissing the indictment.

[21] This fact does not distinguish *Koonce* from the case before us for purposes of double jeopardy analysis. If, like Koonce, Witte had received the statutory maximum sentence for all of the drugs (365 months), it might appear wasteful – though not a violation of double jeopardy – to prosecute him for the cocaine offense. But as Witte's counsel admitted at oral argument,the government does recognize some benefit from a second conviction: it receives a $50 cost assessment to balance the budget, and more importantly, the second conviction serves as a predicate for enhanced punishment under recidivist statutes. That second conviction reflects Witte's actual recidivist status.

The government then brought a second indictment charging Koonce with the 963 grams of methamphetamine found in his home. The Tenth Circuit employed a three-step analysis to determine whether double jeopardy was thereby violated: First, had Koonce been punished for the methamphetamine found at his residence? Second, if so, did Congress intend that an accused in Koonce's position receive *cumulative*–although not necessarily *consecutive*–sentences from two separate proceedings if both sentences punish the accused for exactly the same conduct? Finally, if the first two inquiries are answered affirmatively, does the second punishment constitute "double" punishment even though the sentence derived therefrom is specified to run concurrently with the first sentence?

In answering the initial inquiry, the court concluded that Koonce had been punished for the drugs found at his residence because his base offense level would have been lower had they not been included via the relevant conduct provisions of the Guidelines. The "real offense" approach of the Guidelines required that Koonce be *punished* for the acts included in relevant conduct; therefore, concluded the *Koonce* court, he was punished.[22]

Second, the *Koonce* court found that the government had failed to point out "any authority holding that Congress intended to punish a defendant a second time for conduct that [had] previously been aggregated into the base offense level for a related sentence in an earlier

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[22] *Id.* (emphasis added).

prosecution."[23] The court relied on (1) § 3D1.2's grouping requirement, which mandates that a defendant's base offense level be determined by aggregating drug quantities from multiple counts in a single proceeding, and (2) the Sentencing Commission's announced goal of preventing prosecutorial charge manipulation,[24] to determine that Congress intended only one punishment rather than multiple punishments. The purpose of grouping is to ensure that an accused receives the same sentence that he would have received had he been charged and convicted of one narcotics count based on the same totality of facts. Recognizing that Koonce had received the statutory maximum sentence possible for the total quantity of drugs, the Tenth Circuit concluded that Congress could not have intended a larger punishment if a defendant were prosecuted in two proceedings.

Third, the *Koonce* court concluded that even if the defendant's second sentence were specified to run totally concurrent with the first, a second sentence would violate double jeopardy. The court relied on *Ball v. United States*,[25] Ball, a previously convicted felon, was convicted in one proceeding for (1) the "receipt" of a firearm and (2) the "possession" of a firearm. He was sentenced to consecutive terms of imprisonment. On appeal, the Fourth Circuit remanded with instructions to modify the sentences to make them concurrent. The Supreme Court

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[23] *Id.*, 945 F.2d at 1151.

[24] *Id.*, 945 F.2d at 1151-52; United States Sentencing Commission, *Guidelines Manual*, Ch. 1, Pt. A.4(a), policy statement (1993).

[25] 470 U.S. 856, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985).

concluded that, as both offenses were established by the same criminal act, Congress had not intended to subject Ball to two *convictions*. Thus "one of the convictions, as well as its concurrent sentence, [was] unauthorized punishment for a separate offense."[26] In Koonce, the Tenth Circuit relied upon these statements to posit that a concurrent sentence can be "punishment."[27] As the Tenth Circuit had already decided that Congress had authorized only one punishment for that criminal act, the court concluded that this second punishment violated double jeopardy.

In *United States v. McCormick*,[28] the Second Circuit adopted *Koonce's* analytical framework. It affirmed the dismissal of bank fraud charges for acts that were used in a prior case as relevant conduct to compute the defendant's base offense level. McCormick was charged with bank fraud in Connecticut that resulted in a $75,000 loss. Subsequent to that indictment, McCormick was charged for bank fraud in Vermont that allegedly resulted in a $4 million loss. He was then convicted on the Connecticut

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[26] *Ball*, 470 U.S. at 864, 105 S.Ct. at 1673.

"A separate conviction, apart from the concurrent sentence, had potential adverse collateral consequences. . . . " *Id.* at 865, 105 S.Ct. at 1673-74 (noting the potential for an increased sentence under a recidivist statute, possible delays in parole eligibility, and the societal stigma that results from the conviction itself).

[27] *Koonce*, 945 F.2d at 1153. We do not disagree, but note that *any* sentence is punishment. The issue on which we part ways with the Tenth Circuit is whether a second punishment is authorized by Congress, the second element of the Tenth Circuit's analysis.

[28] 992 F.2d 437 (2d Cir. 1993).

bank fraud charge. At sentencing for the Connecticut conviction, the loss was calculated to be in the $2.5-5 million range, a sum that obviously included the Vermont loss. McCormick's motion to dismiss the Vermont bank fraud charges on double jeopardy grounds was granted.

The Second Circuit determined that inclusion of the Vermont amount in relevant conduct amounted to punishment for the Vermont fraud in the Connecticut proceedings, and that a second punishment for the Vermont loss would violate double jeopardy: The Sentencing Guidelines' grouping provision requires that defendants in fraud cases, like drug offenders, be assessed "a single punishment for a set of similar acts."[29] "The Guidelines achieve consistency in sentencing for fraud cases by grouping all of the relevant conduct and applying a single offense level to the whole course of conduct."[30] The Second Circuit concluded that Congress apparently did not intend to allow a defendant to be *prosecuted* for conduct already used to increase his or her offense level. Being skeptical of the way that the Tenth and Second Circuits reached those results, we now examine the double jeopardy question independently.

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[29] 992 F.2d at 440; *see* U.S.S.G. § 2F1.1, comment. (n.6) ("The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction.".

[30] 992 F.2d at 440.

a. Inclusion of Cocaine in Relevant Conduct: Punishment?

First, the government contends that inclusion of the cocaine in relevant conduct to *calculate* the defendant's base offense level is legally no different that *enhancing* his sentence by increasing a base offense level to a higher level under the Guidelines because of prior criminal activity. As increasing a base offense level by use of prior crimes is not "punishment" for prior crimes, argues the government, neither is using prior crimes to calculate a base offense level punishment for those prior crimes. Thus, concludes the government, Witte has not been "punished" for the cocaine offense. Witte counters that although enhancement of a sentence may not be punishment, counting the cocaine to determine his base offense level, with a corresponding 287-month increase in the maximum possible length of his sentence, is punishment.

It is well-settled that using prior crimes to *"enhance"* a sentence does not impinge on double jeopardy, because defendants are not "punished" for crimes so considered.[31] Pre-Guidelines, uncharged criminal conduct could be "considered" at sentencing as aggravating circumstances and could still form the basis of a later indictment, conviction, and sentence without violating double

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[31] If a defendant is convicted of murder and given a life sentence, and is later convicted for having kidnapped the murder victim, the sentencing court may consider the fact that the kidnaping victim was murdered when assessing a death penalty rather than a life sentence without violating double jeopardy. *Williams v. Oklahoma*, 358 U.S. 576, 585-86, 79 S.Ct. 421, 426-27, 3 L.Ed. 2d 516 (1959).

jeopardy.[32] The "real offense" approach to relevant conduct, however, may well lead to the conclusion that Witte was "punished" for the cocaine offense.

Stepping back from the somewhat artificial distinction between enhancement and calculation of a base offense level, we examine whether, pre-Guidelines, the prosecution and punishment of Witte for the cocaine offense would have been foreclosed because Witte's cocaine activities were considered in imposing sentence for the marijuana offense. *Williams v. Oklahoma*[33] indicates that the answer is no. As the Supreme Court noted in *Williams*, the sentencing court "is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime."[34]

> And in view of the obvious fact that, under the law of Oklahoma, kidnapping is a separate crime, entirely distinct from the crime of murder, the court's consideration of the murder as a circumstance involved in the kidnaping crime cannot be said to have resulted in punishing petitioner a second time for the same offense, nor to have denied to him due process of law in violation of the Fourteenth Amendment.[35]

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[32] *Sekou v. Blackburn*, 796 F.2d 108, 111-12 (5th Cir.1986) ("[C]onsideration of other crimes at sentencing does not implicate the Double Jeopardy Clause because the defendant is not actually being punished for the crimes so considered." 796 F.2d at 112.).

[33] 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed.2d 516.

[34] 358 U.S. at 585, 79 S.Ct. at 426-27.

[35] 358 U.S. at 586, 79 S.Ct. at 427.

In Witte's case, the sentencing court is required by the Guideline's relevant conduct rules to consider the circumstances surrounding the particular offense of conviction. We find it clear that, like the crimes of kidnap and murder of the kidnap victim in *Williams*, the marijuana charge to which Witte pleaded guilty and was sentenced is an offense separate and distinct from the cocaine offense.[36] If, in *Williams*, consideration of the conduct constituting the separate offense of murder to increase the severity of the sentence for kidnaping was not punishment for the conduct so considered, then the use of relevant conduct to increase the punishment of a charged offense does not punish the offender for the relevant conduct. Of course, there is double use of single acts, but *Williams* apparently permits this. Williams was given a life sentence for murder and then the same murder was used to step up his punishment for kidnaping to death.

The only ostensible missing link in this analysis lies in the answer to the question whether, when Williams was sentenced to life imprisonment for murder, the sentencing court considered the kidnaping of the murder victim. Although not clear from the text of *Williams*, we may fairly assume that the uncharged kidnaping was considered when Williams was sentenced for murder. After all, the sentencing court "[was] authorized, if not required to consider all of the mitigating and aggravating circumstances involved in the crime."[37] If so, then *Williams* is this case–*pre*-Guidelines.

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[36] *See supra* note 17.

[37] *Williams*, 358 U.S. at 585, 79 S.Ct. at 427.

The fact that Witte's double jeopardy challenge arises *post*-Guidelines does not change the analysis of the punishment issue presented in *Williams*. Before adoption of the Guidelines, judges exercised their sound discretion in determining the appropriate level of punishment within established statutory ranges of imprisonment. Post-Guideline, judges are still required to determine a sentence within an established statutory range. The Guidelines simply provide a formulae for what used to be left to trial court discretion. To improve consistency in sentencing, the Guidelines attempt to accommodate multiple uses of conduct. Specifically, the Guidelines require that when, in cases such as Witte's, the sentencing court has considered the marijuana conviction in determining the offense level for the cocaine offense, the court must impose concurrent sentences.[38]

Even if we assume arguendo that *Williams* does not absolutely dispose of this threshold punishment question, we would not end our analysis at this juncture. Rather, we accept for purposes of our analysis that Witte has been punished by inclusion of the cocaine activities in relevant conduct and proceed to consider whether a second punishment is nonetheless permitted by Congress.

b. Guidelines Authorize Multiple Punishment

We therefore turn to the Guidelines to determine the appropriate punishment–single or multiple – to be

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[38] U.S.S.G. § 5G1.3(b). This subsection will be discussed in further detail in Part B, Section 2 of this opinion.

assessed.[39] The Tenth Circuit's observation that grouping rules under the Guidelines prevents double counting and thus count manipulation is accurate. If Witte had been convicted in one proceeding of both the cocaine and marijuana offenses, grouping of counts – aggregation of the drug quantities – would result in a Guideline range of 292-365 months. The high end of the range serves as a cap to the *length* of the sentence (punishment) that Witte can receive for both offenses.[40] But the question here is whether Congress intended Witte to be subject to multiple punishments (a second punishment) for the cocaine – that had already been included in relevant conduct for a related sentence – as long as the aggregate length of his sentences did not exceed the lesser of the cap provided by the range or the statutory maximum sentence.

The Tenth Circuit found no authority in the Guidelines that Congress intended to punish a defendant a second time for conduct that has previously been aggregated into the base offense level for a related sentence in an earlier prosecution.[41] But that court did not have the benefit of the present § 5G1.3(b) of the Guidelines, which Witte concedes in his motion to dismiss would require imposition of concurrent sentences if he were tried and

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[39] *United States v. McCormick*, 992 F.2d 437, 442 n. 1 (2d Cir.1993) (Mahoney, J., dissenting) (noting that the majority properly recognized that "in the sentencing area, Congressional intent is reflected in the Sentencing Guidelines").

[40] The same is true if Witte is convicted in two separate proceedings for these offenses. His punishment cannot exceed 365 months in length. As we will demonstrate, this is accomplished by imposing concurrent sentences.

[41] *Id.*, 945 F.2d at 1151.

convicted of the cocaine offense. Section 5G1.3 provides in pertinent part:

> *Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment*
>
> (b) If . . . the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.[42]

The commentary to § 5G1.3(b), application note 2, reflects that

> Subsection (b) . . . addresses cases in which the conduct resulting in the undischarged term of imprisonment has been fully taken into account under § 1B1.3(Relevant Conduct) in determining the offense level for the instant offense. This can occur, for example where a defendant is prosecuted in both federal and state court, or in two or more federal jurisdictions,[43] for the same

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[42] U.S.S.G. § 5G1.3.

[43] Two separate indictments were brought against Witte in the same federal jurisdiction, the Southern District of Texas (Houston division). Although subsection (b) discusses "two or more federal jurisdictions," Witte does not argue that § 5G1.3(b) does not apply on this basis. A common sense approach to that language is that subsection (b) also addresses prosecutions in "the same federal jurisdiction twice," i.e., the Southern District of Texas and the Southern District of Texas. Subsection (b) probably assumes that multiple counts resulting from the same course of conduct would be brought together if they occur in the same federal jurisdiction. Just as there are valid reasons for

> criminal conduct or for different criminal transactions that were part of the same course of conduct.[44]

The commentary clearly permits a defendant to be prosecuted – and sentenced – in more than one federal proceeding for different criminal offenses that were part of the *same course of conduct*.[45] More importantly, a defendant's base offense level for each offense of conviction – unless the Guidelines expressly provide otherwise – *must*

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bringing two separate indictments against a defendant in two federal jurisdictions, there are valid reasons for bringing two separate indictments against a defendant in the same jurisdiction. In this case, the government did not believe that the offenses were part of the same course of conduct and had not completed its investigation of the cocaine offense.

[44] U.S.S.G. § 5G1.3, comment. (n. 2).

[45] *United States v. Cruce*, 21 F.3d 70 (5th Cir. 1994). In *Cruce*, this circuit indicated its disagreement with the Tenth and Second Circuits' views in *Koonce* and *McCormick*. Therefore, in this opinion, this panel is not free to adopt the approach of those cases. In *Cruce*, as in this case, it is to be noted that the defendants faced punishment for conduct that had not been charged, but that had been included in relevant conduct when they were sentenced in an earlier prosecution. *Cruce* expressly states that consideration of relevant conduct does not punish defendants *for relevant conduct* so considered but *for the offense of conviction*. *Id.* at 75 n. 8. Despite the temporal differences noted by the majority in *McCormick* between those circumstances and the circumstances set forth in § 5G1.3(b), the court in *Cruce* concluded that § 5G1.3(b) applied to the defendants because "it is clear that Congress and the Sentencing Commission anticipated the imposition of punishment – whether concurrent or consecutive – in a second proceeding and, thus, did not intend to preclude such proceeding." *Id.* at 77 n. 11. Accordingly, *Cruce* held that the second punishment did not violate double jeopardy.

be determined on the basis of *all relevant conduct*.[46] The principle that all relevant conduct be considered in determining a defendant's base offense level is neither optional nor hortatory; it is mandatory.

Read in pari materia, § 5G1.3(b) clearly provides that the government may convict a defendant of one offense and punish him for all relevant conduct; then indict and convict him for a different offense that was part of the same course of conduct as the first offense – and sentence him *again* for all relevant conduct. To repeat, this proposition merely reflects Congress's specific intent that *all* relevant conduct be considered in determining a defendant's sentence. Consequently, we find no basis for distinguishing the situation described by § 5G1.3(b) from the one before us today.

Like it or not, we are satisfied that § 5G1.3 reflects Congress's intent to prevent punishment from being larger if the government chooses to proceed with two different proceedings – and that Congress accomplishes this intent – not by foreclosing a second prosecution but by directing that the length of the resulting term of imprisonment be no greater than that which would have resulted from prosecution and conviction on both counts in a single proceeding. Section 5G1.3(b), therefore, accomplishes in successive proceedings what grouping of counts pursuant to § 3D1.2 accomplishes in a single proceeding. Thus § 5G1.3(b) is "authority . . . that Congress intended to punish a defendant a second time for conduct that has previously been aggregated into the base offense

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[46] U.S.S.G. § 1B1.3(a).

level for a related sentence in an earlier prosecution," authority that the Tenth Circuit – without the benefit of § 5G1.3(b) in its present form – found lacking when it analyzed Koonce's double jeopardy challenge.[47]

The Second Circuit had the benefit of § 5G1.3(b) but distinguished the situation in *McCormick* from that described in § 5G1.3(b). That distinction concerns *when* the defendant will be punished for both offenses in a single sentencing proceeding, i.e., whether the defendant will be punished for both offenses at sentencing for the first offense (McCormick's situation) *or* at sentencing for the second offense (the Second Circuit's view of § 5G1.3(b). But in our view, under § 5G1.3(b) and relevant conduct principles, the defendant is punished for both offenses *both* at sentencing for the first offense and at sentencing for the second offense.

With all due respect, we believe that the Second Circuit's analysis of § 5G1.3(b) suffers from two errors: first, it ignores – under § 5G1.3(b) – the application of relevant conduct principles to sentencing for the first offense; second, it does not consider McCormick's situation *at the relevant stage* addressed by § 5G1.3(b), i.e., at the sentencing stage for purposes of the instant offense.[48]

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[47] *Koonce*, 945 F.2d at 1151.

[48] 992 F.2d at 441 n. 3. Again, it is the punishment or the sentence imposed for the cocaine offense, not the prosecution for that offense, that implicates double jeopardy concerns. If multiple punishments are impermissible, we foreclose a prosecution for the cocaine offense not because the prosecution would violate double jeopardy, but because it would be a waste of judicial resources to proceed to the sentencing stage only to have imposition of a sentence barred by double jeopardy.

The *McCormick* court did not consider that, *at sentencing* for the second offense, McCormick could be punished *again* for all relevant conduct. Section 5G1.3(b) assumes that a defendant has been prosecuted and convicted for the instant offense – an offense that was part of the *same course of conduct* as an offense for which there is already a conviction and for which an appropriate *Guidelines* sentence has been assessed (hence the application of relevant conduct at the first sentencing proceeding) – and that it has proceeded to the sentencing stage.

Nevertheless, the Second Circuit recognized that in a case governed by subsection (b), the Sentencing Commission would require concurrent sentencing to avoid multiple punishments.[49] Thus, two sentences, though concurrent, have been authorized by the legislature in this situation, and thus would not violate double jeopardy. The significance of this analysis should be obvious: it is not the subsequent *prosecution* that is affected, but the subsequent *sentence* that may be pronounced and the manner in which such sentence may be imposed, assuming that the permitted subsequent prosecution produces a conviction.

3. Sentencing for the Cocaine Offense

Witte argues that the drafters of § 5G1.3(b) could not have foreseen the circumstances of this case: a 5K1.1 motion in the first prosecution that will not pass to the second prosecution. Witte insists that it is unfair to allow

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[49] 992 F.2d at 441 n. 3.

the government – which received substantial assistance from a defendant in its initial prosecution of that defendant – to seek imposition of a *longer,* though concurrent, second sentence. In effect, Witte is asking this court to adopt a per se rule that the second sentence imposed cannot exceed the first if the first resulted from a § 5K1.1 motion, i.e., to "pass" the effect of a 5K1.1 motion from one sentencing proceeding for one offense of conviction to a subsequent sentencing proceeding for another offense of conviction. But Witte's otherwise appealing argument ignores an important aspect of the substantial assistance that he gave: It related only to the marijuana offense, not the cocaine offense. Significantly, Witte's argument also ignores application note 2 to § 5G1.3(b) and the background to this section, which makes clear that § 5G1.3(b) is intended to result in the appropriate incremental punishment that most nearly approximates the sentence that would have been imposed had both sentences been imposed at the same time.[50] This is accomplished both by (1) imposition of a concurrent sentence, and (2) giving credit for time served.

If Witte is ultimately convicted of the cocaine offense, the base offense level will necessarily be the same as that for the marijuana offense because relevant conduct is the same for both the marijuana and cocaine offenses. Even so, there may be still be adjustments to the base offense level. For example, that level could be increased for an aggravating role or decreased for acceptance of responsibility.[51] For illustrative purposes, we assume that the

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[50] U.S.S.G. § 5G1.3, comment. (n. 2, backg'd).

[51] *See* U.S.S.G. § 5G1.3(b), comment. (n. 2).

offense level will again be 40, and that the Guideline range will be 292-365 months.[52] The sentencing court will then have to determine the appropriate *total* punishment for *both* offenses. For purposes of this illustration, we choose 292 months as the appropriate total punishment. Witte must then receive credit for time served. If, for example, Witte shall have served 30 months for the marijuana offense by the time of the second sentencing, the sentencing court must credit Witte with 30 months served, and impose a sentence of 262 months (292 minus 30) to run concurrently with the remainder of Witte's sentence for the marijuana offense. As the commentary to § 5G1.3(b) emphasizes, the 262-month sentence is not a departure from the Guidelines, but reflects a credit for Guidelines purposes for time that Witte has served. Under § 5G1.3(b), then, Congress allows "double punishment" for the cocaine offense but ameliorates its harsh impact and prevents punishment from exceeding the statutory maximum by causing sentences for both the marijuana and cocaine offenses to run concurrently and by giving credit for time served.

We turn now to the alternative basis urged by Witte for dismissal of the indictment.

B. *Breach of Plea Agreement*

Witte claims that the government breached the plea agreement by "re-indicting" the "same conspiracy." Again, as part of the plea agreement for the marijuana

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[52] The sentencing court could even depart from the applicable Guideline range in response to a § 5K1.1 motion.

offense, the government dismissed the first count against Witte, conspiring to possess with intent to distribute more than 100 kilograms of marijuana from January 25, 1991 to February 8, 1991.

1. Standard of Review

Whether the government has violated the terms of the plea agreement is a question of law, which on appeal is reviewed do novo.[53]

2. No Breach

In determining whether the government has breached a plea agreement, the court must determine "whether the government's conduct is consistent with the defendant's reasonable understanding of the agreement."[54] The defendant must prove the underlying facts that establish a breach by a preponderance of the evidence.[55]

During the sentencing hearing, Witte expressed a belief that he would be immune from prosecution in other cases. But Witte's counsel immediately contradicted Witte's statement. Additionally, his counsel asked the court not to include the cocaine because it would deprive Witte of the opportunity to plead not guilty and go to trial on that offense, not – as Witte contends – so that he could argue "breach of the plea agreement." Witte was

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[53] *United States v. Valencia*, 985 F.2d 758, 760 (5th Cir.1993).

[54] *Valencia*, 985 F.2d at 761 (citing *United States v. Huddleston*, 929 F.2d 1030, 1032 (5th Cir. 1991)).

[55] *United States v. Hernandez*, 996 F.2d 62, 64 (5th Cir.1993).

expressly informed by the court that the government wanted to indict him later on the cocaine offense, and Witte expressed his understanding of this advice. Finally, Witte's substantial assistance did not relate to the cocaine offense, but only to the marijuana offense. Thus even if Witte somehow subjectively clung to the belief that he could not be prosecuted for the cocaine offense, that is not a reasonable understanding of the plea agreement. The government has not breached that agreement.

Witte nevertheless contends that the government's present indictment charges him with the count that was dismissed pursuant to the plea agreement. We disagree. This indictment charges Witte with conspiring and attempting to import 1,091 kilograms of cocaine between August 1989 and August 1990. The government dismissed a count of conspiracy to possess with intent to distribute in excess of 100 kilos of marijuana from January 25, 1991 through February 8, 1991. Witte argues, though, that the same conspiracy underlies both counts, and that the government is bound under either of two doctrines – (1) the law of the case, or (2) collateral estoppel – by a "same conspiracy" finding by the sentencing court. Witte premises his argument on the novel idea that the sentencing court's "same course of conduct" finding constitutes a "same conspiracy" finding. This argument is unavailing.

A same conspiracy finding may be necessary to include the acts and omissions of *others* as relevant conduct, but it is not necessary to include Witte's own acts in

relevant conduct.[56] The PSR Addendum refers to Witte's "agreement" (i.e., conspiracy), but the district court never specifically stated that he adopted the PSR or that specific finding. The only express finding by the sentencing court on this issue is that the relevant conduct spelled out in the PSR was "relevant conduct" *related to the charge* to which he pleaded guilty." Neither did the sentencing court find that the cocaine and marijuana offenses were part of the "same conspiracy" count that was dismissed.

Even if on dismissing the indictment the district court had found that the marijuana and cocaine offenses were part of the same conspiracy, we would review such a finding for clear error only. Under the facts of this case, it is obvious that two distinct conspiracies were involved: they were separated by time; they involved different co-conspirators; they involved different statutory offenses; they included different overt acts in each offense charged; and they occurred in different geographical locations.[57] Witte clearly has not been indicted for the same conspiracy count that was dismissed pursuant to the plea agreement.

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[56] U.S.S.G. § 1B1.3(a)(1)(A), (a)(1)(B), (a)(2).

[57] *United States v. Marable*, 578 F.2d 151, 154 (5th Cir.1978). In his brief, Witte demonstrates that the Guatemala cocaine and Mexico marijuana deals were part of the same conspiracy Witte's comparison is inapposite: the relevant inquiry is whether both foreign deals (the cocaine offenses) were part of the same conspiracy as the deal that occurred in the United States (the marijuana offenses).

## III

## CONCLUSION

For the foregoing reasons, we conclude that the district court improperly dismissed the indictment on double jeopardy grounds. Neither may the court's dismissal of the indictment be sustained on grounds that the government breached the plea agreement. The dismissal of the indictment is therefore REVERSED and the case REMANDED for proceedings consistent with this opinion.

SUPREME COURT OF THE UNITED STATES

No. 94-6187

Steven Kurt Witte,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

January 6, 1995